Decision and Order of the National Labor Relations Board enforced by the Court appears as Appendix B (pp. A12- A171).

II. Jurisdiction

The opinion of the Court of Appeals was rendered November 21, 1969. Petitioner's Petition for Rehearing and Petition for Rehearing En Banc was denied January 12, 1970. On January 19, 1970, a stay of mandate was granted to and including March 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

As will be shown below, the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other courts of appeal on the same matter; has decided questions of national labor law in a way in conflict with applicable decisions of this court; has departed from accepted and usual legal principles and has sanctioned such departure by the Board, all of which calls for an exercise of this Court's power of supervision. If allowed to stand, the Court's judgment enforcing the Board order will open a veritable Pandora's box of litigation and woes for employers (and ultimately for unions too) and will nullify Section 8(d).

III. Questions Presented

The questions presented for review are:

1. Whether the Court of Appeals erred in enforcing a Board Order which violated Section 8(d) (29 U.S.C.A. Sec. 158d) of the Act in that the order compels Tex Tan to agree to Union proposals and requires the Company to make concessions to the Union.

2. Whether the Court erred in, in effect, holding that the Company's complete contract proposal or at least some of its provisions to be *per se* violations of the Act.

3. Whether the Court erred in enforcing a Board Order which dictated the substantive terms of a collective bargaining agreement.

4. Whether the Court erred in holding that Article III of the Company's proposed contract was *per se* a violation of the Act.

5. Whether the Court erred in enforcing a Board Order which required Tex Tan to rewrite a portion of its contract proposal to the Union.

6. Whether the Court erred in enforcing a Board Order which required the Company to rewrite the portion of its contract proposal which gave the Union unlimited access to Company records with reference to the Company's standard-hour incentive system.

7. Whether the judgment of the Court sanctioning a Board Order which compels an employer to make concessions and to agree to substantive terms in a collective bargaining contract is in conflict with *NLRB v. American National Insurance Company,* 1952, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 and with other decisions of courts of appeal hereinafter cited.

8. Whether the Court erred in holding that as to the cause of the strike, it was bound by an ex parte self-serving statement by a Union official and could ignore the undisputed fact that the Union called the strike in an effort to secure additional concessions from the Company.

9. Whether the Court erred in enforcing a Board Order that absence from work while on strike was not absence from work under the vacation plan established by the Company and the Union, and that the Company could not lawfully exclude strike time, such Board Order arbitrarily ignoring and disregarding its own established policy of more than twenty years' standing (which policy it has affirmed since the Tex Tan decision).

10. Whether the Court erred in holding that Tex Tan could be found guilty of unfair labor practices not alleged in any charge or in the complaint, and whether such holding is viola-

tive of the Administrative Procedure Act and the fundamental requirements of due process.

11. Whether the Court erred in holding that it was proper and permissible for the Trial Examiner, in effect, to amend the complaint in his decision and to make new allegations long after the end of the hearing.

IV. Statutes Involved

Statutes here involved include:

1. The following portion of Section 8(d) of the Labor-Management Relations Act:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." (29 U.S.C.A. Section 158 (d))

2. The Administrative Procedure Act, 5 U.S.C. Section 554(b)(3), requires that "persons entitled to notice of an agency hearing shall be timely informed of. . . the matters of fact and law asserted."

V. Statement of Case

Section 8(a)(5). This is a Section 8(a)(5) case in which the Court of Appeals has enforced a Board Order which commands the Company to make changes in its last contract proposal, which changes amount to additional concessions to the Union. At least one of the dictated changes is to a section of the Company contract proposal to which the Union had agreed.

The complete record consists of a 7 volume appendix. References will be given to the volume number (Roman) and the page numbers. Page numbers of the appendix to this petition will be preceded by the letter "A". Although the record is voluminous, the Court will need to refer to very little of it.

Negotiation for Second Contract. This case grows out of negotiations between the parties for a second contract. The first two-year contract between the parties was scheduled to expire on June 3, 1965, but by mutual agreement was extended for several months. Twenty bargaining conferences were held, beginning April 29, 1965 and ending September 29, 1966. The Union called a strike on November 7, 1965 and ended it on June 6, 1966.

No dispute as to position of parties and what happened at bargaining sessions. Stenographic transcripts of the bargaining sessions introduced at the hearing eliminate any dispute as to what occurred at the bargaining sessions. In addition, the record contains the minutes of each session prepared by the Company negotiators and sent by them to Company executives immediately after each meeting. The position of the parties are reflected by written contract proposals which are in the record. The Company submitted a complete contract proposal on July 28, 1965 (VI 2958, et seq). Union submitted a contract proposal on October 18, 1965 (VI 2731, et seq). The last complete Company contract proposal was submitted on September 29, 1966 at the last bargaining session (VI 2808, et seq). At the beginning of the hearing, the Union offered to accept this Company proposal, if the Company would add to it a provision for the check-off and an additional concession on daily overtime. (V 2606, 2612, 2648)

Complaint. As 8(a)(5) violations, the complaint alleged (1) the Company negotiated "with no intention of entering into any final or binding collective bargaining agreement"; (2) the Company refused to consider any proposal other than an extension of the expiring contract. The Trial Examiner and Board made no finding with reference to either of these allegations. Instead, the Company was ordered to make the changes in its contract proposal which will be discussed below. (A166-167)

Not Involved Here. No independent 8(a)(1) violations were found by the Trial Examiner or the Board. Also completely absent from this case is any contention that the Company violated Section 8(a)(5) by granting unilateral increases. There is no contention that there was any Section 8(a)(3) violation prior to the end of the strike. Likewise wholly absent in the case at bar is any evidence of statements by the Company that it "would never sign a contract with any union" (*NLRB v. Denton,* 217 F. 2d. 567, CA 5, 1954), or "there is no basis for a contract at Majure" (*Majure v. NLRB,* 192 F. 2d. 735, CA 5), or "we are not going to give the union anything" (*A.H. Belo Corp. v. NLRB,* 411 F. 2d. 959, CA 5, 1969).

Strike Cause. Although the undisputed evidence established that the Union called the strike to force additional concessions from the Company on the issues concerning which the parties were deadlocked including wage rates, check-off, vacations, holidays, and the form of the arbitration article, and that the Union official in stating that the strike was being called because of the Company's "refusal to bargain" on wages, Union security, etc. was equating refusal to bargain and refusal to recede from an announced position or to make a concession, the Board found that the strike was an unfair labor practice strike based on the Union official's ex parte self-serving statement.

Vacations. The matter of paid vacations was covered in the expired contract in Article VI. Section 10 of this article provided that an employee absent from work in a vacation year for more than 280 hours lost his vacation pay. (VI 2703) Under this provision, which continued to be Company policy after the contract expired, most of the strikers did not qualify for vacations.

Although the Board had a long-standing rule established in 1948 in *General Electric,* 80 NLRB 910, that employers may lawfully exclude strike time in awarding vacation pay and other benefits and although this rule was recognized by the Board in *Great Dane* 150 NLRB 439, and in other decisions since, the Board arbitrarily and capriciously failed and refused to apply its *General Electric,* rule here, and ordered the Company to pay vacation benefits to employees who were not entitled to them under the vacation plan established by Union contract long prior to the strike.

The order required the Company to pay employees vacation pay due "pursuant to Respondent's vacation plan described in Article VI of Respondent's contract with the Union dated May 10, 1963, disregarding for this purpose his absence from work between November 8, 1965 and June 3, 1966, both inclusive." (A169-170) The order thus requires the Company to make a concession to the Union which the Union sought unsuccessfully to obtain in the negotiations (III 1135, 1136, 1138) and in effect rewrote the Company contract proposal to eliminate Section 10 of Article VI.

VI. Reasons for Granting the Writ

There are several questions presented in this case of profound significance in national labor law, any one of which is of enough importance to call for the granting of the writ. In addition, conflicts between the decision here and previous decisions of the Supreme Court and other decisions of Courts of Appeal call for the granting of the writ. We will elaborate briefly:

A. Violation of Section 8(d) and misconstruction of Section 8(a)(5).

1. *The judgment of the Court of Appeals enforces a Board Order which plainly violates Section 8(d), 29 U.S.C.A. Sec. 158d of the Act in that it compels the Company to agree to Union proposals and requires the Company to make concessions to the Union.*

2. *The judgment of the Court of Appeals erroneously and contrary to law holds that the Company's complete contract proposal or at least some of its provisions to be per se violations of the Act.*

The essence of the Board Order, which appears on pages A166-A167 of the Appendix to this petition, quickly brings into focus the vice in it:

Paragraph 1(a) of the order requires the Company to include in its contract with the Union a provision giving employees the right to file grievances on the establishment of standards for piecework, in a manner different from the Company's contract proposal. For the convenience of the Court, Article III of the Company's contract proposal of September 29, 1966, is attached as Appendix C (pp. A 172 - 174). As will be noted, Section 12 of this article contractually establishes existing piecework standards and gives employees the right to file grievances on new or materially modified standards. This portion of the order not only plainly violates Section 8(d), but is in conflict with this Court's decision in the "Trilogy" (*United Steelworkers v. Enterprise v. Warrior v. American Mfg.*, 363 U.S. 593, 574, 564) which held that arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Justice Brennan (joined by Justices Harlan and Frankfurter) in a concurring opinion said:

> "and I emphasize this, for the arbitration promise is itself a contract. *The parties are free to make this promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreements.*" (Emphasis added)

Paragraphs (b) and (c) of the order requires the Company to include in the contract a definition or guiding principle as to productivity speed ratings and an agreement as to productivity speed ratings. This subject is covered in Section 10 of Article III. (A 173) Thus, the order enforced by the Court in effect holds that this section of Article III is *per se* a vi olation of the Act.

Paragraph (d) of the order would require the Company to rewrite Article III of its contract proposal. This article fixes the rates of pay of its employees on both piecework and time-work for the term of the contract. The order dictates that these rates be fixed in some way other than the way in which they are fixed in the Company contract proposal. Again, Article III is, in effect, held to be *per se* illegal.

Paragraph (e) of the order requires the Company to agree to furnish the Union its job descriptions. Section 5 of Article III (A 172) gives the Union much more than this: it gives the Union unlimited access to not only job descriptions but any other of the industrial engineer's records or matters concerning the standard hour system. What further concession the Company is required to make is not revealed. A verbatim copy of this Section 5 appears as Section 2 of Article III of the *Union's contract proposal* of October 18, 1965. (VI 2733) In other words, the Board order requires the Company to rewrite a provision of its contract proposals, which was agreed to by the Union.

All of these contract provisions which the Board order would require the Company to rewrite were agreed to by the Union on March 3, 1966. (VI 2992)

The statement in the Court's opinion that the Board did not attempt to dictate what the agreement might be is in square conflict with the record. The opinion does not say in so many words that the Company contract proposals were illegal *per se*, but in referring to them as "linguistic obscurantism", this is plainly the intention of the Court. An agreement of necessity must be "linguistic" for language is the stuff of contracts. "Obscurantism", as defined in the dictionary, does not seem to be pertinent here. We must assume that the Court has held that the Company had no legal right to seek the provisions embodied in its contract proposal.

Citation of Pre-Taft-Hartley Case. The fact that the Board and the Court disregarded Section 8(d) is strongly indicated by their citation of *Stonewall Cotton Mills v. NLRB*, 1941, 129 F: 2d. 629 (CA 5), in which one of the reasons cited by the then three-man Board in support of its 8(5) charge was the failure of the company to "make concessions." We have already pointed out that the other cases relied upon by the Board and Court involved facts and other violations which are not present here.

No Credibility Determination Involved. Because of the stenographic transcripts of the bargaining sessions and the actual written contract proposals in the record, there is no occasion for any credibility determination. Either the contract and its provisions were valid or they were illegal *per se.* The ultimate question becomes one of law: whether the Board, consistent with the intention of Congress as expressed in the statute, can compel a party to make concessions to the other party, such as the Board order would require the Company to make.

Sum of Nothing Equals Something. The Court adopts the Trial Examiner's illogical conclusion that while the various items of "action or nonaction" of the Company in themselves were not illegal, the sum of this *permissible* "action and nonaction" amounted to something illegal. The Court's detection of "an air of filibustering. . .through administrative moils" (whatever that is) and its reference to "procrastination" and "negativity" have no support in the record. The Board found no impropriety in the scheduling of the meetings. Apparently by "negativity" the Court means that the Company was required to say "yes" to the Union demands and could not legally say "no".

Perhaps the statements so characterized by the writer of the Court's opinion, were "bromidic", but there is something very unusual and gravely ominous in the order here and its enforcement: *Not since 1947, has there been such a brazen attempt on the part of the Board to dictate the terms of a contract, which according to the law, the parties are free to negotiate themselves.*

The importance of questions here presented is shown by the extent of informed professional literature in this general area. A comment entitled "*The Increasing Control of Collective Bargaining by the NLRB Under the Good Faith Duty*" appears in 50 Marquette Law Review 526 (April 1967), in which the conclusion is reached that the Board is seeking increasingly to seat itself at the bargaining table in derrogation of the right of the parties to be free to come to their own agreement. See also *Harry L. Browne*, "*The NLRB and the Will of Congress: Restoring the Balance of Power in Labor Relations*" 73 Dickinson Law Review 229, (Winter 1969), in which it is concluded that the Board has not carried out Congressional intent; has exercised powers greater than those granted by Congress, and generally has ignored the will of Congress.

Now Chief Justice Burger in his dissenting opinion in *United Steelworkers v. NLRB (Roanoke Iron & Bridges Works, Inc.)*, 1968, 390 F. 2d. 846, 858, said the courts must be "vigilant lest the examination of parties' positions to test good faith becomes a process of judging, directly or indirectly, the substantive terms of their proposals", concluding with this eloquent and prophetic statement:

> "I suggest that today's holding contains the seeds of danger for unions in their collective bargaining rights. The standards for bargaining in good faith are of necessity a two-way street; what the majority decides today applies to unions as well as to employers. Freedom of contract is highly important and to no one more than to the worker whose economic position is inherently weaker than that of the employer. A holding that the duty to bargain means one bargainer is *compelled* to agree, apart from being a contradiction in terms, is pregnant with the risk of a finding one day that a union must yield to some particular employer proposal unless it can articulate a solid union reason for not doing so. I would reject the notion that a union, in this context, must explain its motives to anyone."

Labor leaders in opposing the antistrike legislation proposed by Secretary of Labor Shultz, condemn it as "compulsory arbitration in disguise." *U. S. News and World Report*, February 23, 1970, p. 87. The decision sought to be reviewed here is undoubtedly an example of *un*disguised compulsory arbitration which is not only unauthorized by law, but is sought to be carried out in patent defiance of the statute.

3. *The Court's decision is in conflict with decisions of the Supreme Court of the United States, and of other Circuits.*

Supreme Court. The Board's order and the Court's judgment are in conflict with *NLRB v. American National Ins. Co.*, 1952, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027, where the Court held that the Act does not "regulate the substantive terms. . . in an agreement". The Court pointed out that the express purpose of Section 8(d) was to prevent the Board "in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and the proposals and counterproposals which he may or may not make." The Court held that the Board may not, either directly or indirectly, "compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.".

Conflict with 6th Circuit. In *NLRB v. United Clay Mine Corp.*, 1965, 319 F. 2d. 120 (CA 6), the court denied enforcement of an 8(a)(5) order, notwithstanding the fact that the evidence established that the employer bargained "hard" - - a great deal "harder" than the employer in the case at bar. The court pointed out that the Board's decision "carried to its logical conclusion, would cast the suspicion of illegality upon any union or employer which takes a firm stand in collective bargaining." The court said: "It is not for the Board or the Court to determine what in their opinion the respondent should have agreed to, and, in effect, make the contract for the parties." *Fetzer Television, Inc. v. NLRB*, 1963, 317 F. 2d. 428, (CA 6), is a similar case in which the Board denied enforcement of an 8(a)(5) order.

Conflict with 8th Circuit. In *NLRB v. Gopher Aviation, Inc.*, 1968, 402 F. 2d. 176 (CA 8), the court denied enforcement of a Board 8(a)(5) order holding that the Board had no authority to require the making of a concession or to compel either party to agree to a proposal, citing *NLRB v. Wonder State Mfg. Co.*, 1965, 344 F. 2d. 210 (CA 8).

B. Cause and Character of Strike

4. *The holding of the court, as to the cause of the strike, that it was bound by an ex parte, self-serving statement by a Union official, who equated refusal to bargain with refusal to make a concession, is contrary to law, the record establishing without dispute that the Union called the strike in an effort to secure additional concessions from the Company.*

The Court below fallaciously held that it was bound by the Trail Examiner's acceptance of an ex parte, self-serving statement by a Union official at a Union meeting as to the cause of the strike, dismissing it as a "credibility determination." Here again, no credibility determination is involved.

Even assuming that the Union official made the statement, the record establishes that "as in *Amalgamated Association v. NLRB*, 1961, 294 F. 2d. 264, (CA DC), he equated "refusal to bargin in good faith and refusal to recede from an announced position." (IV 1988-1999) The holding of the Court of Appeals on this point is in square conflict with *Winter Garden Citrus Products Co-op. v. NLRB*, 238 F. 2d. 128, where the court overruled the Board which had given weight to a self-serving telegram and letter from the union, stating they were an "ex parte effort to make a record by assuming an attitude which was inconsistent with other facts definitely established." The undisputed evidence establishes that at the time of the strike the parties were deadlocked on a number of issues, and that the purpose of the strike was to force the company to make additional concessions on wages, union security, etc.

This is an extremely important issue: if the holding is allowed to stand uncorrected, a party can fix or determine whether it is an unfair labor practice strike or an economic strike by its own arbitrary *ipse dixit*.

C. *Arbitrary Award of Vacation Pay to Strikers*

5. *In holding that absence from work while on strike was not absence from work under the vacation plan established by the Company and the Union and that the Company could not lawfully exclude strike time, the Board not only held contrary to law but arbitrarily ignored and disregarded its own established policy of more than twenty years' standing (which policy it has affirmed since the Tex Tan decision);*

the Court erroneously enforces such unlawful and arbitrary action.

General Electric Rule. In 1948 in *General Electric*, 80 NLRB 510, the full Board ruled that employers may lawfully exclude strike time in awarding vacation pay and other benefits, and that while the Company allowed nonstrikers to accrue vacation and retirement benefits, as well as money wages for the period of the strike, even though they did not actually work, while denying same to strikers, there was no *unlawful* discrimination against the strikers. This has been the Board rule ever since. No change was made in this rule in *Great Dane Trailers.* In its *Great Dane* decision, in Footnote 2 the Board expressly affirmed *General Electric* and distinguished *Great Dane* on the ground that the Company established a new vacation plan after the strike started which took from the strikers vacation rights which they had *accrued*, prior to the change in plans. 150 NLRB at 439 (1964)

More than a year after the Supreme Court decision in *Great Dane Trailers*, the Board decided *Kimberly-Clark Corporation*, 171 NLRB No. 82 (1968), in which it adhered to the *General Electric* rule which the Board had also followed in *Mooney Aircraft*, 148 NLRB 1057 (1964) and in *Ace Tank and Heater Co.*, 167 NLRB No. 94 (1967), the Board stating that the rule stated *Great Dane* that where there is discrimination, the employer must show a business reason, has no application when there is no illegal discrimination, and that there was no unlawful discrimination where the disqualification for vacation benefits resulted from the application of the plan in effect at the time the strike started.

The Court (but not the Board) sought to sustain the Board's arbitrary action by making a distinction between economic and unfair labor practice strikers. Contrary to the Court, no such distinction is made. Just as an unfair labor practice striker is not entitled to wages during the time he is on strike, he is not entitled to vacation benefits, if his absence during the strike disqualifies him under the vacation plan in effect. The strikers held by the Board not to be entitled to vacations in *Mooney* and *Ace Tank* were unfair labor practice strikers.

Mastro Plastics and *Majure* cited by the Court in support of its erroneous proposition that unfair labor practice strikers are placed "in an especially protected category" entitling them to vacation benefits "without regard to the number of days absent during the strike", in no way support the Court. These cases hold only that unfair labor practice strikers are entitled to reinstatement to their jobs when they make an unconditional offer to return to work.

American Shipbuilding Co. v. NLRB, 380 U.S. 300, cited by the Trial Examiner, simply holds that an employer may use a lockout as an economic weapon for the purpose of improving his position. A quotation from the opinion of Justice Stewart, speaking for six members of the Court, is pertinent in support of the proposition that there was nothing illegal about Petitioner's contract proposals. The quotation appears in Appendix D. (A 175)

As recently as *November 24, 1969*, the Board again reaffirmed the *General Electric* rule and held that it was not affected by *Great Dane*, in *Illinois Bell Telephone Co.*, 179 NLRB No. 119, holding that *Great Dane* in no way changed the established Board rule that an employer may lawfully exclude strike time in determining the eligibility of employees for vacations and other benefits.

Notwithstanding all this, the Board order while recognizing that the Company's vacation plan at the time the strike started consisted of that embodied in its contract with the Union dated May 10, 1063, arbitrarily held that absence from work during the strike had to be considered time worked. (A 170)

It is essential that this unbelievably arbitrary action be reviewed by this Court, not only because of the Court's duty to protect the citizen from arbitrary and unlawful action by an administrative agency, but also because this order creates chaos as to the vacation rights of strikers. If allowed to stand, it can only give rise to a flood of litigation on this question alone.

This portion of the order also violates Section 8(d) because it compels the Company to make a concession (in the form of the elimination of Section 10 of Article VI), which the Union sought unsuccessfully to obtain in the negotiations. (III 1135, 1136, 1138) The Board not only sought to write the prospective contract between the parties, but rewrote *retroactively* the contract which the parties had agreed upon and lived with for more than two years.

D. Lack of Due Process in Finding Violation not Alleged in the Complaint.

6. *The Court erred in enforcing a Board finding of 8(a)(5) violation not alleged in the complaint, such holding being violative of due process.*

As pointed out above, the Board made no finding with reference to the two allegations in the complaint that the Company did not intend to enter into a contract and that it refused to consider any proposal other than an extension of the expiring contract, but found the Company guilty of other violations not alleged in the complaint: (1) insisting on unilateral control of pay for pieceworkers and refusal to bargain about pay rates, and (2) "overall approach to bargaining."

In *Boyle's Famous Corned Beef Co. v. NLRB*, 1968, 400 F. 2d. 154 (CA 8), the Court denied enforcement of a Board order which made findings of violations not alleged in the complaint, saying: "We think the party charged should be given fair notice of. . .violations charged."

In *NLRB v. Johnson*, 1963, 322 F. 2d. 216 (CA 6), the Court denied enforcement of a Board order where the act found to be a violation was not alleged in the complaint, the Court saying: "It must be borne in mind that we are here dealing with a question of fundamental fairness" and cited the Administrative Procedure Act.

The main reason the record is so voluminous and contains so much evidence that is irrelevant and immaterial to any issue in the case is the lack of specific allegations in the complaint: the Company had no way of knowing what specifically it was charged with having done which was illegal.

The fact that the matters referred to in the Court's opinion as evidence of bad faith have no support in the record is shown by a brief analysis which appears in Appendix F. (pp. A176)

VII. Conclusion

The Board decision here and the Court's judgment enforcing it represents a giant step away from the rule of law in the field of labor, where the rule of law is already gravely threatened. Petro, *The Labor Policy of the Free Society 264*; Hayek, *The Constitution of Liberty 283*; *43 Texas Law Review 215* (a pertinent excerpt from which article appears in Appendix E attached hereto at A175). Only the courts, and particularly this court, can protect the citizen from unlawful, capricious and arbitrary bureaucratic action.

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

Respectfully submitted,

Theo. F. Weiss
1805 N.B.C. Building
San Antonio, Texas 78205
Attorney for Petitioners-Respondents,
Tex Tan Welhausen Company and Tex
Tan Western Leather Company,
Division of Tandy Corporation

Of Counsel:

Clemens, Knight, Weiss & Spencer

March, 1970

Certificate of Service

A true copy of the foregoing petition has been forwarded by certified air mail to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Penn 17 Building, Washington, D. C., and to L.N.D. Wells, Jr., 1601 National Bankers Life Building, Dallas, Texas, Attorney for Intervenor, on this 5th day of March, 1970.

Theo. F. Weiss

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 26338

TEX TAN WELHAUSEN COMPANY AND
TEX TAN WESTERN LEATHER COMPANY,
DIVISION OF TANDY CORPORATION,

Petitioners-Respondents,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Petitioner.

(AND REVERSE TITLE)

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(November 21, 1969)

Before BELL and GOLDBERG, Circuit Judges, and ATKINS, District Judge.

GOLDBERG, Circuit Judge: We here review a struggle of seemingly epic proportions enshrined for posterity in a record of more than 3,000 pages. In this labor case the Companies, Tex Tan Welhausen and Tex Tan Western Leather, hereafter referred to as Tex Tan, challenge an order of the National Labor Relations Board, and the Board cross petitions for enforcement of its order. This case arises out of contract negotiations entered into between Tex Tan and the Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, hereafter referred to as the Union. In March 1965, two months before its old contract expired, the Union notified Tex Tan that it wished to negotiate a new contract, and on April 5, 1965, the negotiations began. After months of conferences, the Union called a strike on November 8, 1965, claiming that Tex Tan was not bargaining in good faith. The Union simultaneously filed an unfair labor practice charge with the Board. During the strike and until the time of the hearing the negotiations continued but without success. In the meantime the strike terminated, and more unfair labor practices charges were filed when Tex Tan did not reinstate all strikers to their pre-strike jobs.

The National Labor Relations Board, adopting the findings of the Trial Examiner, found: (1) that Tex Tan had refused to bargain about piecework standards and piecework grievance procedures, and (2) that Tex Tan's overall approach to bargaining was not in good faith in violation of Section 8(a)(5), 29 U.S.C.A. Section 158(a)(5). As examples of Tex Tan's overall bad faith the Trial Examiner mentioned: a) Tex Tan's threat to move its plant to Puerto Rico; b) Tex Tan's refusal to discuss a wage increase until it obtained the seniority, grievance, arbitration, and piecework clauses it wanted; c) Tex Tan's refusal to incorporate into the contract matters which it claimed were its actual practice, including the Union's right to timestudy a job, the Union's right to file grievances on the establishment of standards, and a prohibition against retiming a job for high earnings; d) its issuance of a new rule book without notice to the Union; e) Tex Tan's avoidance of issues at the bargaining table and its avoidance of any tentative decision on these issues; f) Tex Tan's use of negotiators who had no authority to bargain; g) Tex Tan's frustration of the Union's attempts to make proposals acceptable; h) Tex Tan's use of unreasonable arguments in order to avoid reaching any agreement on arbitration, overtime, ventilation, and incorporation in the contract of the Company's own language regarding the retiming of job standards; and i) Tex Tan's refusal to give the Union's timestudy engineer sufficient information to timestudy existing jobs.

The Board also accepted the Trial Examiner's finding (3) that the strike was caused and prolonged by the Company's refusal to bargain in good faith and was, therefore, an unfair labor practice strike. On the basis of finding No. 3 the Board found (4) that Tex Tan's failure to reinstate employees to their prestrike jobs was a Section 8(a)(3), 29 U.S.C.A. Section 158(a)(3) violation and that the issuance of warning slips for low production to employees rehired for unfamiliar jobs was a Section 8(a)(1), 29 U.S.C.A. Section 158(a)(1) violation. The Board further found (5) that the denial of vacation pay to the strikers on the basis of their absence while striking was discriminatory and coerced the employees in the exercise of their rights in violation of Section 8(a)(1) of the Act.

Pursuant to these findings the Board ordered that the Company cease and desist from these unfair labor practices and ordered Tex Tan to take certain affirmative action in expiation of its misadventures.

Tex Tan challenges the findings and the order of the Board on four grounds. First, it claims that the findings are not supported by substantial evidence. Second, Tex Tan contends that it was denied a fair hearing because some of the findings concern matters not alleged in the complaint and were therefore outside the legitimate scope of the Board's inquiry. Third, the Company contends that the order, even if based on proper findings, went beyond the remedial measures authorized in the National Labor Relations Act. Finally, Tex Tan argues that it was denied a fair hearing because of the bias and prejudice of the Trial Examiner. Finding no merit in these contentions we enforce the Board's order.

I.

This court's function regarding Tex Tan's first complaint is clearly circumscribed by the substantial evidence rule. To be bromidic, if substantial evidence exists in the record as a whole to support the findings of the Board, its determination must be sustained by this court. *Universal Camera Corp. v. NLRB*, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456; *NLRB v. Walton Mfg. Co.*, 1961, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed. 2d. 829; *NLRB v. Mayes Bros. Inc.*, 5 Cir. 1967, 383 F. 2d. 242; *NLRB* *v. McGahey*, 5 Cir. 1956, 233 F. 2d. 406; *NLRB v. Poultry Enterprises, Inc.*, 5 Cir. 1953, 207 F. 2d. 522. We see no point in elaborating on the detailed evidence concerning the various examples of Tex Tan's misbehavior which is contained in this mammoth record. Suffice it to say that there is ample evidence in the record to sustain the Trial Examiner's finding that Tex Tan did refuse to bargain in good faith regarding the piecework standards and grievances, and that its overall approach to bargaining was not indicative of a good faith attempt to reach contract terms.

The Company asserts in its defense that there was no refusal to bargain and that the Trial Examiner found it guilty because he did not like the manner in which it bargained, the order in which subjects were discussed, its failure to make concessions, and its overall bargaining strategy. The evidence, however, does not support these contentions. The Trial Examiner noted that he did not intend by the enumerations of the examples of Tex Tan's behavior to "indicate that each such action or nonaction by itself, would in all circumstances show bad faith." Rather, he noted that "an overall appraisal of Tex Tan's bargaining compels the conclusion that it did not approach the negotiations 'with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' " The record unquestionably supports the Trial Examiner's conclusion. It is true as the Company asserts that it continued to conduct many prolonged negotiating sessions. It is also true that the employer's mere refusal to concede during contract negotiations is not in itself a refusal to bargain. *NLRB v. American National Insurance Co.*, 1952, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027; *Division 1142 Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, AFL-CIO v. NLRB*, D.C. Cir. 1961, 294 F. 2d. 264; *White v. NLRB*, 5 Cir. 1958, 255 F. 2d. 564; 29 U.S.C.A. Section 158(d). However, the record demonstrates that during these sessions Tex Tan was really engaged in what this court has termed mere "shadow boxing to a draw," *Stonewall Cotton Mills, Inc. v. NLRB*, 5 Cir. 1942, 129 F. 2d. 629, 631, *cert.*

denied, 317 U.S. 667. In fact we detect an air of filibustering from the inception of negotiations through the administrative moils. Obduracy and obstinacy may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them sanction or refuge. Procrastination and negativity are not components of negotiation. *A. H. Belo Corp. v. NLRB*, 5 Cir. 1969, 411 F. 2d. 959, *NLRB v. Reed & Prince Mfg. Co.*, 1 Cir. 1953, 205 F. 2d. 131. The Act requires more than pretense. "There is a duty on both sides, though difficult of legal enforcement, to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement." *Globe Cotton Mills v. NLRB*, 5 Cir. 1959, 103 F. 2d. 91, 94. *Accord*, *NLRB v. Herman Sausage Co.*, 5 Cir. 1960, 275 F. 2d. 229. While the Act does not require bargaining table surrender, it does require good faith discussions. Tex Tan breached this duty and was, therefore, guilty of an unfair labor practice. *NLRB v. Mayes Bros.*, 5 Cir. 1967, 383 F. 2d. 242; *NLRB v. Southwestern Porcelain Steel Corp.*, 10 Cir. 1963, 317 F. 2d. 527; *NLRB v. Herman Sausage Co.*, *supra*, *NLRB v. Denton*, 5 Cir. 1954, 217 F. 2d. 567, *Cert. denied*, 348 U.S. 981; *Majure v. NLRB*, 5 Cir. 1952, 198 F. 2d. 735.

Furthermore, there is substantial evidence in the record as a whole that it was Tex Tan's refusal to bargain in good faith which prompted the workers to go out on strike. Tex Tan asserts that this finding is based solely on the self-serving testimony of the Union negotiator and should not be accepted by this court. We reject this contention. The Trial Examiner and the Board chose to accept this testimony and, to be bromidic once again, it is clear that all questions as to credibility are to be resolved by the Board. As this court said in *Independent, Inc. v. NLRB*, 5 Cir. 1969, 406 F. 2d. 203:

> "[I]t is a settled and by now a familiar principle that the decision of a Trial Examiner affirmed by the board is not open to attack merely on grounds of allegedly erroneous credibility determination. N.L.R.B. v. West Point Mfg. Co. 5 Cir. 1957, 245 F.2d 783, Martin-

> Sprocket & Gear Co. Inc. v. N.L.R.B., 5 Cir. 1964, 329 F.2d 417; Great Atlantic and Pacific Tea Co. v. N.L.R.B., 5 Cir. 1966, 354 F.2d 707." 406 F.2d at 205.

Accord, Universal Camera Corp. v. NLRB, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456; *NLRB v. Buddy Schoellkopf Products, Inc.*, 5 Cir. 1969, 410 F. 2d. 82; *NLRB v. Camco*, 5 Cir. 1965, 340 F. 2d. 803, *Cert. denied*, 382 U.S. 926.

We also reject Tex Tan's other evidentiary objections. The record as a whole contains substantial evidence to support the findings of the Trial Examiner as affirmed by the Board, and we see no justification to depart from these findings.

Having come to the conclusion that the evidence shows Tex Tan's unfair labor practices were the cause of the strike, we find that those parts of the Board's order relating to reinstatement and back pay for the strikers are valid. *Mastro Plastics Corp. v. NLRB*, 1956, 350 U.S. 270, 100 L.Ed. 309, 76 S.Ct. 349; *Mature v. NLRB, supra*. Furthermore, that part of the order regarding low production slips for employees reemployed but placed on new jobs is also valid. An unfair labor practice striker is entitled to reinstatement to his old job. Hence no employee should be disciplined for low production when he is working at a new job after returning from an unfair labor practice strike. To so discipline him would penalize him for engaging in his protected right to strike.

II

Tex Tan's second objection is that the Trial Examiner deprived it of due process by making findings on matters not alleged in the complaint. In particular Tex Tan contends that the insistence on unilateral control of pay for pieceworkers, the refusal to bargain about pay rates, the overall approach to bargaining, and certain of the examples of overall bad faith were not alleged in the complaint. While it is true that these matters were not specifically alleged in these words in the complaint, we find Tex Tan's contention that it has been harmed by this omission without merit. To begin with, there was a specific allegation in the complaint that Tex Tan had negotiated in bad faith with no intent to enter a contract with the Union. This court has recently held that such an allegation brings into question "the general course of the Company's conduct as it reflected its attitude toward bargaining." *NLRB v. Mayes Bros.*, 5 Cir. 1967, 383 F. 2d 242, 247. Each of the Trial Examiner's specific findings to which Tex Tan objects was apposite to the issue of the Company's attitude toward bargaining, and therefore under the *Mayes Bros.* rule was fairly comprehended in the language of the complaint. See also *NLRB v. Southwestern Porcelain Steel Corp.*, 10 Cir. 1963, 317 F. 2d 527.

Moreover, even if the specific examples of bad faith bargaining were not so included, the Company would still have little ground for complaint. All of these matters were fully discussed during the negotiations and no objection was made to the introduction of this evidence at the hearing. Both parties fully litigated the issue of good faith bargaining and assumed that these issues were relevant and proper subjects of inquiry. In such a situation the Company has not been prejudiced by the failure of the complaint to articulate in precise detail each and every example of behavior which indicates that the Company negotiated in bad faith. Tex Tan did not litigate in ignorance. It was fully apprised of each issue and can claim no surprise. *A. H. Belo Corp. v. NLRB*, 5 Cir. 1969, 411 F. 2d 959; *NLRB v. United Nuclear Corp.*, 10 Cir. 1967, 381 F. 2d 972; *Montgomery Ward & Co. v. NLRB*, 8 Cir. 1967, 385 F. 2d 760. Compare with *Boyles Famous Corned Beef v. NLRB*, 8 Cir. 1968, 400 F. 2d 154.

III

Tex Tan next complains that the order entered by the Board forces it to put matters in the contract which have never been agreed upon and which are beyond the power of the Board to order. We find no merit in this complaint. The order relating to grievances requires that Tex Tan stop insisting on a provision which would deprive the employees of their right to file grievances regarding the establishment of piecework standards. Those parts of the order concerning the piecework production standards are closely related to the grievance procedures and the two will therefore be discussed together.

The Company's incentive system operates so that the employees receive wages based on the percentage of their actual production compared to a standard production norm assigned to each job. The standard, therefore, controls the amount of pay received. The Union was interested in a contract clause which would (1) assure that the standards were fairly set and (2) provide a basis for judging the fairness of the standard if a grievance should arise. The negotiations concerning these issues are typical of the Company's tactics during the bargaining conferences. Tex Tan managed to stifle all Union attempts to write a definition or guiding principle concerning the determination of the standards. For the most part this was accomplished by playing semantic games with the Union negotiator. During the early discussions the Company claimed the production standards and grievances on these standards were covered by the existing contract, but it refused to say what section of the contract applied. Tex Tan objected when the Union proposed to specifically include a definition and a grievance procedure in the contract. Finally Tex Tan submitted a proposal of its own concerning the definition of the standard. In this the Company restated the definition found in its employee booklet, but prefaced it with the suspicious language "without in any way limiting the Company's authority." When asked to explain this clause, the Company responded with the enlightening information that "it meant exactly what it said." The Union then suggested that the contract include language that the job standards would not be changed simply because of high earnings. The Company refused, saying this language would imply that this had been done in the past. The Union then offered to preface the suggested clause with the statement that "just as in the past" job standards would not be changed for reason of high earnings alone. At this point the Company replied that the

Union was trying to wreck the system. The negotiations never progressed any further on this issue. The Board's order does no more than require the Company to bargain in good faith and cease its surreptitious semantic ploys and maneuverings which frustrated any hope of agreement on a contract definition which would be meaningful for purposes of determining whether a specific standard was fair.

Another part of the order takes care of the complementary problem and requires the Company to bargain in good faith about the grievance procedure. Since both wages and grievances are mandatory subjects of bargaining and the record as a whole indicates that Tex Tan's behavior was but a pretense at bargaining, the Board's order is reasonable. 29 U.S.C.A. Section 158(d). Contrary to Tex Tan's assertions the order only requires that any agreement reached be incorporated into the contract. The Board did not attempt to dictate what the agreement might be. The order does, however, require the Company to include in the contract those things which are agreed upon in principle. In other words, linguistic obscurantism can no longer be used as a shield.

The Board also entered an order relating to timestudy information. This too is a part of the piecework standard controversy. The timestudies are an integral part of establishing the standard of productivity, and to check the fairness of any standard established the Union must have access to the Company's timestudy data. Since we have held that the Union has a right to such information, *Waycross Sportswear, Inc. v. NLRB*, 5 Cir. 1968, 403 F.2d 832, the Board's order in this respect is clearly proper.

The remaining order objected to by Tex Tan concerns the vacation pay due the strikers. The old contract provided that vacation pay would be figured as a percentage of the employee's yearly salary, but that if any employee missed more than 280 hours of work in any year or was not employed on December 31 of any year, then all vacation pay would be forfeited. The Company chose to apply this policy to the strikers even though the contract had expired. The result was that all employees who remained on strike for the entire period were deprived of their vacation pay for both 1965 and 1966. The Trial Examiner and the Board held that since vacation pay was figured as a percentage of the amount earned, vacation benefits were already proportionately reduced for the time the workers were on strike and the further complete forfeiture of vacation benefits would unlawfully restrain and discriminate against the employees for engaging in their protected right to strike. The Trial Examiner based his decision on *NLRB v. Great Dane Trailer Co.*, 1967, 388 U.S. 26, 18 L.Ed. 2d 1027, 87 S.Ct. 1792, wherein the Supreme Court held that the denial of vacation benefits to strikers while paying such benefits to nonstrikers was discriminatory and a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C.A., Section 158(a)(3). Tex Tan attempts to distinguish its position by asserting that it did not discriminate against strikers, claiming instead that the vacation policy was applied to strikers and non-strikers alike. While technically this may be true, the result of Tex Tan's policy was to deprive strikers of their vacation benefits. The strikers had a choice — lose their benefits or refrain from striking. We hold this is an unfair choice when (1) vacation benefits are a percentage of wages paid and thus have a built-in adjustment for any work time lost because of the strike, and (2) the strike is an unfair labor practice strike. The court in *Great Dane* made it clear that there must be a valid business purpose for any action of the employer which has a discouraging effect on present or future concerted activities. The rule of *Great Dane* applies to coercion or restraint regardless of whether it is discriminatory under Section 8(a)(3) or mere restraint under Section 8(a)(1). The employer here has shown no valid business purpose for requiring a complete abrogation of vacation benefits in addition to the proportional reduction already built into the system. This, combined with the fact that unfair labor practice strikers are placed in an especially protected category, *Mastro Plastics Corp. v. NLRB*, 1956, 350 U.S. 270, 100 L.Ed. 309, 76 S.Ct. 349; *Mamre v. NLRB*, *supra*, is sufficient to justify the Board's order that Tex Tan pay vacation benefits to the strikers without regard to the number of days absent during the strike.

Moreover, Tex Tan's claim that there was no discrimination here is deceptive. It is true that on its face the vacation policy could be applied to all employees, strikers and non-strikers alike. Nevertheless, it is equally clear that the result in this case was that the strikers were injured because they exercised their right to strike. There was no way under Tex Tan's policy that an employee who remained on strike for the full term of the strike could receive vacation pay. Whatever the result might be if this had been an economic strike we need not here decide. We do hold that since this was an unfair labor practice strike the Company's vacation policy was both a restraint against the exercise of a protected activity under Section 8(a)(1) and discriminatory under Section 8(a)(3).

IV

Tex Tan's final complaint is that it was denied due process because of the bias and prejudice of the Trial Examiner. The Company's cry of foul merits scant attention. Far from showing prejudice the record indicates that the Trial Examiner showed remarkable restraint and patience during the outbursts and side bar comments which repeatedly marked the proceedings. Tex Tan's allegation of unfairness is like that of an athletic loser who in the agony of defeat swears that the umpire was blind or prejudiced. The record here demonstrates that this was not the case.

We have searched the record to ascertain if there be validity to Tex Tan's other contentions and find each without merit. The game was fairly won and the score must stand.

For the foregoing reasons the order of the Board is ENFORCED.

172 NLRB No. 93 D-928

Yoakum, Texas

DECISION AND ORDER

United States of America
Before The National Labor Relations Board

Tex-Tan Welhausen Company and
Tex-Tan Western Leather Company,
Division of Tandy Corporation

and Case 23-CA-2222

Amalgamated Meatcutters and Butcher Workmen
of North America, AFL-CIO

On November 24, 1967, Trial Examiner George Turitz issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in certain other unfair labor practices and recommended dismissal of those allegations of the complaint. Thereafter, the Respondent and Charging Party filed exceptions to the Decision and supporting briefs.[1] The General Counsel filed cross-exceptions and a supporting brief and an answering brief to Respondent's exceptions.

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[1] We have noted the Charging Party's motion to strike certain material from Respondent's brief as gratuitous invective and scurrilous insults directed to the Trial Examiner and to matters outside the record unrelated to any issues in the case. As the Board gives no weight to such immaterial and irrelevant matters, we deem it unnecessary to physically expunge such matters from the brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, motion and briefs, and the entire record in the case, and hereby adopts the findings,[2] conclusions,[3] and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

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[2] The Trial Examiner inadvertently stated in the first sentence of Section E (The Negotiations After the Strike) that on June 6, 1966 the Union sent Respondent a telegram declaring that the strike had been terminated, whereas, the record shows that such telegram was sent on June 3, 1966.

[3] The Trial Examiner's findings and conclusions are based, in part, upon credibility determinations to which the Respondent has excepted. Respondent also contends that the Trial Examiner was biased and prejudiced. After careful review of the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all relevant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We also find no support in the record for the charge of bias and prejudice.

Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Tex-Tan Welhausen Company and Tex-Tan Western Leather Company, Division of Tandy Corporation, Yoakum, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. Jul. 1, 1968

Frank W. McCulloch,
Chairman

John H. Fanning, Member

Gerald A. Brown, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

TXD-647-67
Yoakum, Tex.

TRIAL EXAMINER'S DECISION

United States of America
Before The National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Tex-Tan Welhausen Company and
Tex-Tan Western Leather Company,
Division of Tandy Corporation

and Case No. 23-CA-2222

Amalgamated Meatcutters and Butcher Workmen
of North America, AFL-CIO

Richard J. Linton, Esq., of Houston,
Tex., for the General Counsel.
Theo. F. Weiss, Esq., and *Koe L. Brockermeyer, Esq.*, *(Clemens, Knight, Weiss & Spencer)*, of
San Antonio, Tex., for Respondent.
Fred O. Weldon, Jr., Esq. (Mullinax, Wells, Mauzy, Levy & Richards), of
Dallas, Tex., and *Mr. Harold L. Shapiro*, of Houston, Tex., for the
Charging Party.

GEORGE TURITZ, Trial Examiner: A hearing was held before the Trial Examiner from December 5 to

15, 1966, at Victoria, Texas, and from February 7 to 15, 1967, at San Antonio, Texas, on an amended complaint against Tex-Tan Welhausen Company and Tex-Tan Western Leather Company, Division of Tandy Corporation, herein called Respondent and, at times, the Company, or Tex-Tan,[1] issued by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director for Region 23. Said amended complaint was issued November 4, 1966, upon a charge and six amended charges filed by Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, herein called the Union, and duly served upon Respondent.[2] Respondent filed its answer to the amended complaint in which it admitted some of the allegations but denied all allegations of unfair labor practices. The General Counsel and Respondent were represented by counsel at the hearing and the Union by counsel and by an International Representative. All parties waived oral argument at the conclusion of the hearing but thereafter filed briefs with the Trial Examiner.

Upon the entire record and from his observation of the witnesses the Trial Examiner makes the following:

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[1] Tex-Tan Welhausen Company will be referred to as Welhausen and Tex-Tan Western Leather Company as Western.

[2] The original charge was served on November 5, 1965, and the amended charges were respectively served on December 17, 1965, and May 20, July 18, August 9, August 31, and October 31, 1966. The original complaint was issued June 1, 1966.

Findings of Fact

I. The Business of Respondent

Respondent is a New Jersey corporation having its principal office and place of business at Yoakum, Texas, where it is engaged in the manufacture and sale of leather goods. In the course of its operations Respondent annually sells and ships from its place of business products valued at in excess of $50,000 directly to customers located at points outside the State of Texas, and annually purchases goods and materials valued at in excess of $50,000 which are shipped directly to its place of business at Yoakum, Texas, from points outside the State of Texas. It is found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act as amended, herein called the Act.

II. The Labor Organization Involved

Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Introduction*

1. Issues

The central and principal issue litigated at the hearing was whether Respondent failed to bargain collectively with the Union in good faith by insisting on unilateral control of rates of pay for piecework and by its general approach to bargaining. Other issues litigated included whether the employees' strike was caused by unfair labor practices, whether Respondent discriminated against strikers by denying them vacation pay and refusing to reinstate them; and whether Respondent illegally threatened its employees with loss of employment by a letter it sent them before the strike and by means of "warning slips" issued to some who returned to work after the strike.

2. Background

Some years ago the Union was certified as bargaining representative of Respondent's employees in a broad "production and maintenance" unit. On May 13, 1959 the Union filed charges against Respondent upon which the General Counsel issued a complaint alleging, inter alia, violation by Respondent of Section 8(a)(5) of the Act. These allegations were in part sustained by the Trial Examiner and the Board,[3] but on May 24, 1963 the Court of Appeals for the Fifth Circuit denied enforcement of part of the Board's Order and remanded the remainder of the case for a new hearing.[4] Meanwhile, on May 10, 1962, Respondent and the Union entered into their first collective bargaining agreement which was to expire on May 10, 1963 unless automatically renewed because of absence of notice by either party. The Union subsequently withdrew the charge in Case No. 23-CA-920 and on January 3, 1964, on motion by the General Counsel, the complaint in that case was dismissed by the Board.

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[3] [illegible] NLRB [illegible]

[4] N.L.R.B. v. [illegible] F. 2d [illegible]

3. Basic Chronology

On March 5, 1965, the Union wrote to Respondent that it desired to negotiate a new agreement, at the same time giving the required notice to the Federal Mediation and Conciliation Service. On April 5, 1965, George Elwood, the Union's Deputy Administrator for its local in Houston, forwarded to Respondent its "initial proposals" for modification of the contract,[5] reserving the right to add to or amend them during negotiations. Negotiations commenced on April 26, 1965. Various extensions of the old contract were agreed to, but the contract finally expired, apparently on July 10, 1965.[6] On July 28, 1965, and again on September 29, 1965, Respondent submitted complete proposed written contracts, and upon insistence by Respondent, the Union did so on October 18, 1965.[7] On October 18 or 19 the Union held a meeting of the employees at which the employees' negotiating committee was authorized to call a strike, which was subsequently called for Monday, November 8, 1965. A large number of employees responded and picket lines were set up and maintained. The strike was terminated on June 3, 1966. Re-

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[5] General Counsel's Exhibit 4(b). The expired 1963 contract is General Counsel's Exhibit 3.

[6] Respondent's last proposed extension to September 10, 1965 (General Counsel's Exhibit 8) was not accepted by the Union which proposed a shorter extension.

[7] Respondent's Exhibits 10 and General Counsel's Exhibits 12 and 13, respectively.

Respondent eventually offered employment to most, but not all, the strikers, in many cases, however, in different jobs.

Bargaining conferences were held as follows:

Conference	1965	Conference	1966
1st	April 29	1st Executive	January 24
2nd	May 19	11th	January 25
3rd	June 11	2nd Executive	March 3
4th	July 16	3rd Executive	March 11
5th	July 19	4th Executive	March 23
6th	July 22	5th Executive	April 6
7th	August 4	12th	June [illegible]
8th	October 11	13th	July 18
9th	October 20	14th	September 23
10th	December 3	15th	September 29

It will be noted that the ninth conference was held 1 or 2 days after the employees' strike vote, and that seven conferences were held during, and four after, the strike. Five of those during the strike were designated as "executive meetings" and were not attended by committee members or, in some cases, by the Union's chief negotiator, Harold Shapiro. Respondent adduced evidence also of conversations between counsel for the Respondent and for the Charging Party the day the hearing in the present case opened and during the period the hearing was being held which counsel for the General Counsel and for the Charging Party objected to as settlement, rather than bargaining, negotiations and therefore privileged. At most, but not all, of the bargaining sessions the Union's principal spokesman was Harold Shapiro, an International Representative, and Respondent's was Theo Weiss, its attorney. Others who participated to some extent in the negotiations on behalf of the Union were George Elwood, an International Representative and Trustee of the Houston local, A. D. Downer, an attorney and business representative, Abe Fineglass, International vice president and director of the Fur and Leather Department, Fred Weldon, counsel, Sam Tweedell, vice president in the Texas area, and one Nelson; and on behalf of the Respondent were L. Bruce Fryburger and Kae L. Brockermeyer, Weiss' associates, William Manning, production manager of Tex-Tan Western, Arthur Talbert, vice president of Tex-Tan-Welhausen in charge of production,[8] Philip Welhausen, president of Western, Lewis Shaw, president of Welhausen, and C. C. Welhausen and Cliff Shawd, officials of the Respondent. The union representatives were accompanied by employee committee members, usually numbering between 18 and 20, who participated to some extent in the discussions. Starting with the eighth session a Federal mediator, E. H. Kincaid, also attended a majority of the meetings. Respondent operated a tape recorder at all the conferences except the five "executive meetings," and the record contains as exhibits transcripts of those tapes.[9] At the first session the Union objected to the tape recorder but Respondent insisted on its use. The denials of Manning and Talbert that any mention was made of the tape recorder before the fourth session have not been credited. They were contradicted by Dhisnar and Elwood, who were corroborated by Respondent's Exhibit 32, which quotes Weiss as saying, "... At the beginning we invited the Union to bring their own tape recorder."

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[8] Talbert and Manning attended all sessions except the first two executive meetings.

[9] Respondent's Exhibits 20 through 37 and Charging Party's Exhibits 8A through 11.

The Trial Examiner received in evidence as "past recollection recorded" summaries of most of the bargaining sessions, prepared by Respondent's attorneys conducting the negotiations, each summary having been completed within 1 week or less after the session covered.[19] They not only set forth such things as dates, places and participants in the meetings, proposals made and their disposition, but also contained lengthy accounts of the negotiators' statements of position and arguments. Respondent claimed that the summaries were prepared in order that its principal officers could be kept informed of the progress of the negotiations. As described elsewhere in this Decision, the attorneys who prepared the summaries were directly involved in long controversial discussions. The use of the tape recorder at the very start of the negotiations establishes that they were aware of the possibility that an unfair labor practice proceeding would eventuate and that the summaries might be offered as evidence in such litigation. Thus, without any intent to mislead, there would necessarily be some tendency on their part to present their performance in the negotiations in their principals and to the Board in as favorable a light as possible. While this would also be true of a witness, he is on the stand for cross-examination; the summaries are not. Respondent did not even present for cross-examination the persons who prepared the summaries. See III Wigmore on *Evidence*, 3d ed., Section 746. Moreover, in the course of examining the evidence the Trial Examiner has had occasion from time to time to make direct comparison of the summaries with the verbatim transcripts and has found frequent serious inadequacies and inaccuracies in the summaries as to matters bearing materially upon the parties' statements of position and the manner in which the negotiations were conducted. In view of the self-serving character of the summaries and of the extent of inaccuracy and bias disclosed, the Trial Examiner finds them unreliable as evidence of what happened at the negotiations and not entitled to weight. The Trial Examiner does not intend to indicate that the inaccuracies and omissions in the summaries were deliberate. For this reason the Trial Examiner excludes from the finding of unreliability objective facts stated in the summaries of a simple nature such as the dates and times of meetings, the names of the persons present, and the subjects discussed insofar as mentioned.

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[19] No summary was offered of the first two executive meetings or of the three subsequent sessions. Those for the two executive meetings were not offered on the stated ground that they could not be proved except through the testimony of counsel or by [illegible] of a high official of Respondent.

The parties used the expired contract as the framework for their negotiations.[11] At the first conference Weiss suggested that the parties go through the old contract to see whether they were in agreement on parts of it. He then said: "Let me suggest a ground rule here that I think we usually have in these sort of things. That we have an understanding among ourselves that there is no agreement between the parties until we have finally agreed upon a complete contract . . . anything we agree on an article or clause is tentative until we agree on the entire contract and it is ready to be signed. Is that satisfactory with everybody?" The union representatives agreed. At the start of the negotiations Weise also stated that the Company did not consider any increase in labor cost acceptable at that time. He pointed out that the Union's first seven proposals were in that category and therefore he did not discuss any of them beyond stating that the Company had "carefully considered your proposals and everything."

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[11] Proposed drafts of new contracts submitted during the negotiations contained only 22 articles, as against 23 in the old contract. Article XIII of the old contract was in effect merged with Article XIV.

The subject most discussed in the negotiations prior to the strike was Respondent's "Standard Hour Plan" of piecework system,[11] under which 80 percent [illegible] of the employees worked. At the close of the third conference [illegible] stated that the piecework system was "[illegible] the system that we intend to explore just as completely as possible." At the fourth conference Shapiro made an extensive and more emphatic statement to the same effect, concluding:

[11] [illegible] pay in terms of standard hours [illegible] is the same as a piece rate except that it is more convenient when it comes to changing the basic pay with [illegible] advantages to the employees. [illegible] 3rd Edition 1966 Prentice Hall, page [illegible]

> As I said, this is the key to our contract. Regardless of what we may agree upon or disagree upon regarding wages, hours, holidays, insurance, you name it, we will not have a satisfactory relationship unless we resolve some of the problems relative to piece work.

When Weiss commented that in previous negotiations the Union's position had been that the piecework system should be "junked," Shapiro replied that that was not the Union's position, that the Union was going to help the Company make it successful, and that its proposals were designed towards that end.

B. Negotiations up to the Strike

1. The Piecework System

(a) Description

Article III of the expired contract, entitled "Wages" read as follows:

> Section 1. Wages in the Company's production departments shall be those achieved under the Company's established standard hour piece work system, with the hours of accomplished work multiplied by the base rate for each job classification as shown by the Company's records and as developed and established by the Company from time to time. The Company's records reflect the new rates

placed in effect by the Company in September, 1961.

Section 2. It is recognized that the Company's standard hour piece-work system is essential to the efficient operation of the Company. The Union will do nothing to interfere with or in any way obstruct or hamper the operation of this system; provided, however, the presentation of a legitimate grievance under the grievance and arbitration procedure of this contract shall not be a violation of this contract. So long as it is not for the purpose of interfering with, hampering or obstructing the operation of the Company's standard hour system, but for the purpose of determining whether the provisions of this agreement are not being abused, an accredited representative of the Union, after having made previous appointment and at reasonable times, may have access to the industrial engineer's records or matters concerning the standard hour system. No such records shall be removed from the industrial engineer's office.

Section 3. Piece-work standards shall be set by the Company by engineering stop watch studies made in accordance with the Company existing standard hour system. All such standards, as soon as released and put into effect by the Company, will be posted in each factory so that each employee affected will have full access thereto and full knowledge thereof. The Company will continue to furnish the Union with any new and revised piece-work standards.

Section 4. Employees regularly on time work shall be paid wages within the ranges now provided according to the Company's records. Such rates reflect the changes made in September, 1961. The Company, in assigning the time rates within such ranges beyond the automatic stations, may reward skill, versatility, productivity and efficiency.

Section 5. A piece-work employee assigned to a job which is paid on a time work basis, shall receive the classification rate for the job on which he is actually working.

Section 6. Upon the effective date in September, 1963, of the 1961 Amendments to the Fair Labor Standards Act, the Company will add ten cents (10¢) per hour to all rates.

Section 7. In the event it becomes necessary to re-time a job, the employee who is working on the job to be re-timed shall be advised in advance of the actual taking of the timestudy.

Respondent issued to the employees a booklet entitled, "Information Bulletin on Tex-Tan's Standard Hour Plan for Production Workers."[13]

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[13] General Counsel's Exhibit 6.

Piecework wages included two components — the established wage rates for the several job classifications and the established "standards" for the numerous jobs worked on. Negotiations with respect to the two components were carried on separately. A piecework rate was expressed in terms of the "standard hours" necessary for accomplishing 100 units of work, i.e., for performing a particular operation on 100 of the articles being produced. A "standard" of one hour for 100 units meant that an employee received one hour's pay, at the assigned wage rate, for every 100 units he did, subject, however, to a floor of the Federal minimum wage. If that job was rated at $1.30 per hour, the operator received $1.30 for every 100 units, or 1.3 cents per unit, or piece. If Respondent for any reason changed the standard from 1 hour to .80 hours, the same employee would receive only .80 hours' pay, or $1.04, for every 100 units, or 1.04 cents per piece.

The time standards for manufacturing Respondent's numerous products were set by the Standards and Methods Department, headed by Respondent's Industrial Engineer. The process consisted of the following: first, a decision was made as to the exact method for performing the operation and each task within the operation; second, the operation was broken down into parts, known as "elements"; third, an operator was timed by stopwatch as he performed each element and the observed times were recorded on forms called timestudy observation sheets; and fourth, the necessary computations were made to arrive at the "standard hours" for each element and for the entire operation. In making such computations Respondent's timestudy engineer modified the observed time by two factors, namely, an allowance for fatigue, personal needs, rest periods, and minor delays caused by machine breakdowns or similar occurrences — 10 percent on most operations — and an allowance based upon the timestudy engineer's rating of the operator's observed speed as compared with what he considered to be the "norm." While witnesses spoke of giving a speed rating to an operator, what was meant was the operator's speed at the time of rating, and not his ability or usual pace. McClain, Respondent's Industrial Engineer, testified that the concept of "normal" speed is subjective. He illustrated "normal" speed by citing a man walking at the rate of 3 miles per hour, or dealing 52 cards in 30 seconds. Both McClain and Powderly, the Union's timestudy expert, claimed that with training and experience a timestudy man acquires a good sense of what is "normal" speed and an ability to rate the relationship between the speed of observed operations and "normal" speed. McClain testified also, referring to an ordinary operator, that "normal" speed means that the operator "is attaining a hundred percent normal without any special effort." Under Respondent's system if the observed time for 100 units was 50 minutes and the operator was rated as working at "normal" speed, a 10 percent fatigue allowance would bring the standard time for the 100 units to 110 percent of 50 minutes or 55 minutes. If, however, the observed operator was rated as working at 80 percent of "normal" speed — whether because he was working at less than his usual pace or because he was a slow worker — the standard time would be 50 minutes times 80 percent times 110 percent, or 44 minutes.

Shapiro, the Union's chief negotiator, who had had a considerable amount of experience in making and analyzing timestudies and incentive systems, testified credibly that Respondent's timestudy observation sheets were insufficient for checking its timestudies and standards. He stated that a person checking must first ascertain whether the job is being done in exactly the same manner and under the same physical conditions as when the timestudy was made and the standard set, and that this is not possible with the mere listing of elements, as on Respondent's timestudy observation sheets.[14] Thus, he testified, an element expressed as "positioning the material" could not be checked without a more complete description, such as, "He turns around three quarters . . . picks it up, reach [ing] to the floor, puts it down." He also testified that an element, such as "getting materials," could completely destroy the validity of a timestudy standard, unless there was a statement of how often the task had to be performed and a description of how far the operator had to walk for that task so that the checker would know whether the condition was the same as when the timestudy had been made. Shapiro's testimony was borne out by the testimony of Koening, one of Respondent's timestudy employees. He testified that on October 21, 1965, on Job Number F-550 the operator had to walk 10 feet to obtain materials he was to work on. The observation sheet for that job, Respondent's Exhibit 57, did not indicate what the distance had been, if any, when the timestudy had been made .Shapiro's testimony was also corroborated by incidents during negotiations. Complaint was made by employees that the substitution of smaller work tables had resulted in extra work because leather hanging over the side of a table dried more quickly and became harder to work, and the smaller tables became crowded with stacked work, which would slide off. The type of timestudy observation sheet used by Respondent plainly would not have disclosed the dimensions of the tables nor the condition of the leather. Company officials admitted the substitution of the smaller tables though denying its importance. One employee complained that when working the employees had to look for materials, whereas when the job had been timed, the materials had been properly laid out. Manning replied that the foreman was new. Shaefer testified that when, after the strike, he was assigned to a different shift, the materials for his job were not laid out as handily as on his original shift but the standard remained the same. Shapiro's testimony as to the need for carefully detailed and recorded job descriptions is further borne out by timestudy literature.[19]

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[14] See Respondent's Exhibits 56 through 63 and General Counsel's Exhibits 80 through 84.

(b) *Grievances on establishment of standards*

The expired contract, in Article XV, gave the Union the right to file grievances upon ten subjects there listed "and no others." The Article listed the application of various clauses of the contract and of the piecework rates established by the Company but not the establishment of such rates. Respondent had in fact entertained grievances on the establishment of the standards. At the first bargaining session, when the parties went through the old contract clause by clause, both said that the article on grievances was "O.K." On a number of occasions during the negotiations, when objecting to various union proposals to establish contractual limitations with respect to the establishment and changing of piece rates, described below, Weiss pointed to Article XV as providing a means of relief where something was wrong with standards. In its proposed contract submitted on October 18, 1965, the Union included a revision of subparagraph 4 of Article XV reading: "(4) *The establishment of* and the application of any piece work rate established by the Company." At the ninth conference Respondent objected that the old contract was not intended to permit the processing of grievances as to the establishment of piecework rates, but only as to mistakes in their application. Weiss said that with the proposed clause the Union would be involved in the setting of every standard. Shapiro stated that it was intended that Respondent fix standards initially without consulting the Union and that no change from past practice was intended. He suggested that Respondent write its own clause giving the Union the right to file grievances about the establishment as well as the application of the standard. Respondent agreed "to try to draft something. . ." but Weiss explicitly stated that he was not promising to submit anything.

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[19] See, for example, Mundel, *Motion and Time Study* 3rd edition, 1960, Prentice Hall, Inc., pages 340 to 351. Mundel emphasizes the need for accurate recording of the methods and procedures used in making time studies and shows timestudy sheets with scale drawings of work places. The amount of detail needed, however, varies according to the type of work being done and the conditions — see Barnes, *Motion and Time Study-Design and Measurement of Work 5th edition, 1963*, John Wiley and Sons, Inc., page 5.

(c) *Retiming*

At the third bargaining conference the Union proposed a revision of Section 7 of Article III and four new sections.[16] The proposed revision of Section 7 was as follows:

> The Company shall have the right to re-time any job on which a substantial change has been made. Any such retiming and the standard resulting therefrom shall reflect a change in earnings only to the extent of the actual change in the job content. Employees to be time studied shall be advised in advance that the study is to be taken.

Its proposed new Section 9 included the following:

> The Company agrees that no job may be retimed for reason of high earnings alone.

The Union argued: If the Company could change standards in the absence of a substantial alteration of job content or method, it might change standards merely because some employees, as a result of long experiences with a particular operation, had developed high dexterity, and, thus, high earnings; retiming should reflect change in standards only to the extent of an actual change in the operation — for example, a 10 percent saving of work should result in a 10 percent reduction of the standard and not more; the Company would be destroying its incentive system if employees felt that standards might be changed arbitrarily merely because their earnings were deemed excessive; and the chief topic of the employees' complaints to the Union had been the piecework system. Challenged as to this last, Shapiro, supported by committee members, stated that shortly before when the Saddletree Shop had been moved, all jobs had been retimed and that under the new standards the employees' earnings had dropped substantially although their jobs had been unchanged except as to work place and access to materials. Gomez testified to the same effect with respect to rawhide cutting. The Company Representatives expressed concern that the word "substantial" in the proposed Section 7 might cause disputes as to whether retiming was justified. Shapiro suggested that the Company devise its own language but finally agreed to drop the word substantial. Respondent then raised the question of defining the word "change"; it objected also that the provision that a changed standard reflect only the change actually made would result in a grievance "every time" as to the extent of the change and that the matter was too complicated to be spelled out in a contract specifically; and the Company asserted that in practice only the changed elements and those affected thereby were retimed. Weiss objected that the provision against retiming for high earnings would prevent correction of standards based on mistakes made evident by the fact that earnings turned out to be far out of line. Shapiro immediately proposed to add, "This does not preclude the right of the Company to retime a job in which an error has been made in the original study." Weiss replied that the proposal would sow the seed for grievances. Shapiro proposed as an alternative that the contract include a certain sentence from the Company's own booklet describing the piecework system. The Company agreed to take that proposal under consideration. At the next conference, with Weiss absent, Shawd questioned whether booklet language was suitable for a contract, and he said that the Union's original proposal — no retiming for reason of high earnings alone — sounded "on the reasonable side" if safeguarded against "a license to go file for a lot of grievances." Shapiro suggested that he would be satisfied to have the Company write the language. On July 28, when the Respondent presented a complete contract proposal, it included the following in Article III:

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[16] **General Counsel's Exhibit 7.**

> Section 7. Without in any way limiting the Company's authority set forth herein and purely by way of explanation, the Company states that it is its intention that *changes in the method, procedure, layout, and material for the job calls for cancellation of the existing standard and the setting of a new standard to cover the new job. Any variation from the method and procedure used when the timestudy was made is a "method change". All time standards are set for the particular method used at the time the timestudy was made and*, where finally and correctly set, *will not be changed unless the method procedure, layout,* [or] *material* or some other circumstance or condition *is changed*.

The italicized words were passages from the Tex-Tan booklet, the italicized portion of the last sentence being the passage proposed by the Union. At the eighth conference, the first attended by Shapiro since submission of the Company's July 28 proposed contract, Weiss objected to the Union's proposal that changed standards on retiming be limited to reflect a change in earnings only to the extent of the change in job content on the ground that earnings might decrease as the result of less effort. Shapiro replied that it was assumed that if an employee failed to produce the same output he would not have the same earnings, and immediately revised the proposal to substitute change in standard for change in earnings. He commented that the proposal was in lieu of his earlier proposal to use the language taken from the Company's booklet, which the Union would also accept. Manning called attention to Respondent's most recent proposal quoted above, which both Shapiro and Weiss had apparently forgotten. Weiss said that that was a concession Respondent had made to the Union in an effort to reach an agreement. Shapiro asked what the meaning was of the words, "Without in any way limiting Company authority set forth herein and purely by way of explanation," whether that meant that the Company still reserved the right to restudy a job even though there might not have been a method change. He said, "Mr. Weiss, perhaps this proposal could be satisfactory; I am trying to find out what it means." Weiss replied, "It means exactly what it says." The colloquy continued:

Mr. Shapiro: . . . . Now, does this mean that despite your language . . . that if you decide that if you want to restudy a job and change a standard on the job where a method change has not been made you would have the right to do it? Does it mean that?

Mr. Weiss: It means the Company can still operate its standard hour system and that this unnecessary provision shall not be construed as impinging on the Company right to operate that system.

Mr. Shapiro: We will say that six times in the piece work proposal if you want to say it. We will say it seven times, that we will not impinge upon your right to operate the piece work system. I want to impinge on one right which you have allocated to yourself in the past, and that is your right to restudy and change a standard where no change in the job has been made. Now I don't care how you say it. If you say it, it will be acceptable. If you have said it in here, this is acceptable, if that is what you said. Now, I want to know is that what it means?

Mr. Weiss: We think the language is clear and implicit (sic) and speaks for itself.

Mr. Shapiro: Well, is that what it means?

> Mr. Weiss: We don't have to interpret it for you . . . . This is contract language. You've got to read it and reach your own conclusions.

Weldon, the Union's attorney, stated that the clause meant nothing and Weiss did not contradict him.

With respect to Section 9, Respondent insisted that jobs never were retimed by reason of high earnings alone. Shapiro said that in that event there should be no objection to so providing in the contract and he asked whether the Company would be in violation of the old contract if it did retime a job because of higher earnings. Weiss said that the proposed clause would be an implied admission that it had happened. Shapiro proposed that the provision read, "Just as in the past our policy will continue to be that we will not retime a job and change standards on the basis of high earnings alone." Weiss replied that the Union was trying to wreck Respondent's piecework system.

The Union's complete written contract proposal submitted on October 18 dropped the provisions for notice to employees to be time-studied and prohibiting retiming because of high earnings. It included a revision of Section 7 of Article III into two sections, the second reading in relevant part as follows:

> Section 8. All time standards are set for the particular method used at the time the time study was made and will not be changed un-

less the method, procedure, layout or material is changed.[17]

> (a) The Company shall have the right to re-time any job in which there has been a change as described above. Any such re-timing shall reflect a change in the Standard only to the extent of the actual change in the job content. . . .

At the ninth conference Weiss stated that the above proposed Section 8 was unsatisfactory for a number of reasons including, among others, that it omitted the first two sentences of the Company's proposed Section 7 as well as other language in that proposal.

(d) *Averaging*

At the third conference the Union proposed a new section of Article III as follows:

> Section 8. All earnings on piece work shall be guaranteed to the employee and there shall be no averaging of earnings to compensate for the minimum guarantee on jobs on which the employee does not achieve standard production.

As already indicated, piecework employees were guaranteed the Federal minimum wage irrespective of their production. This guarantee, however, was applied on the basis of the employee's earnings for the entire week. The Union argued that where an employee during the week produced above standard, or was on timework, on one or more jobs, and produced less than standard on others, averaging might, in effect, cause him to receive less than the Federal minimum wage when working on the latter jobs. Respondent's first objection to this proposal was on the assumption that it prohibited averaging of earnings during a single day on a single job. When the Union replied that it sought to prevent averaging only of earnings on different jobs, Respondent replied that without averaging an employee "might work like the very devil" on jobs he was familiar with and rest up when assigned to other jobs, assured that he would be paid the Federal minimum. They rejected the Union's claim that at times employees were unable to achieve standard through no fault of their own, notwithstanding alleged instances cited by members of the employee committee present. When the Union suggested that the employer could take disciplinary measures against an employee who loafed on some jobs, Respondent retorted that in such event the Union would, as it had done, bring charges against Respondent. The Union's October 18 proposed contract provided in Article III:

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[17] This sentence was an extract from the Company's booklet.

> Section 9. The employees' incentive earnings shall be guaranteed to them on each job and there shall be no averaging of earnings to compensate for failure or inability to achieve Standard on other jobs.

At the ninth conference Weiss objected to the proposal, stating that the Company felt that averaging was fair.

(e) *Productivity speed rating*

The Union's proposal as to Article III at the third conference included the following:

> Section 9. It is the intent of the parties that with the proper application of incentive effort employees will be able to achieve a minimum of 30 percent above the timestudy standard . . . .

Shapiro claimed that all piecework systems expected average employees to achieve 130 percent of standard if they applied themselves in an incentive manner and he explained that the clause was needed in order to avoid having standards so set that an employee working at an incentive pace would produce only standard. Shawd replied that the timestudy man who did that would not be an engineer. Respondent objected to guaranteeing that employees would achieve 130 percent, pointing out that some were unable to do so. Shapiro replied that no guarantee was requested and suggested adding, "average employees working at a proper incentive." Weiss said, "You have asked us to guarantee that any time somebody failed to make 30 percent above it, we would have a grievance on that and you would wreck the time-study system. I mean you don't understand the system . . ." He brushed aside Shapiro's qualification, "with proper application of incentive effort," saying that there was no way it could be gauged. He said, "The system is that a normal man working at a normal speed achieves 100 percent. You say he has got to achieve 130 percent;" and, "We are surprised that a system which is designed for a normal person to make 100 percent, to require that he make 130 percent."

At the sixth conference, with Shapiro absent, Downer commented, ". . . I understand that an incentive plan or a work standards plan is one in which a majority of the people must break standard or it is not a sound basic plan . . . . Where just a little handful of people or a few people or a minor percentage of people are those who break standard and make greater than 100 percent it is not a sound system." At the seventh conference, with Shapiro still absent, Weiss produced figures showing that during the previous week at Western, of the 199 pieceworkers including trainees, 20 had achieved 140 percent or more, 40 had achieved 130 percent, 59 had achieved 120 percent, 3 had apparently achieved between 100 and 119 percent and 77, or 39 percent of all, had achieved less than 100 percent. He also gave figures showing that at Welhausen in one department 83 percent and in another department 93 percent, excluding trainees, had achieved standard or better.

During the eighth conference the Union revised its proposal to read 25 percent in place of 30 percent. Weiss gave Shapiro the above figures and referred to Downer's statement. Shapiro replied that that was not the Union's position; that the Union's position was that a fairly administered system would result in 100 percent of the employees achieving 125 percent of standard. Weiss accused Shapiro of changing the Union's position and demanded to know whether Downer had authority to speak for the Union. Shapiro said that the

Union would support any agreement reached by Downer but that Downer's statement as reported by Weiss was only an opinion. He said that he was not asking the Company to guarantee 125 percent "to a worker working at 60 or 80." Company representatives then argued that with the 125 percent clause in the contract it would follow that they would be required to get rid of anyone who failed to produce at that rate. Shapiro replied that employees could not be required to work at an incentive pace and that so long as they made 100 percent of standard they were producing all that was required. The Company said that it rechecked when standards seemed wrong but Shapiro replied that the very figures quoted by Weiss established that very few employees achieved 120 percent of standard or better and that Respondent's system was poorly administered. Company representatives expressed sympathy with the idea that employees should produce 125 percent but they raised question as to how to determine what a normal good worker was. Shapiro pointed to a statement in the Company booklet to the effect that "a hundred percent productivity is obtained without special effort." Weiss said that the Union under its proposal could discredit the system by telling employees to slow down, and, he complained that Downer said one thing and Shapiro said another. Shapiro replied, "Let's get something straight for the record. You are making a big deal about what Downer may or may not have said in the last negotiation meeting . . . . We have something on the record that was submitted to you 3 months ago that we discussed in an attempt to negotiate . . . that the intent of the parties that with the proper application of incentive effort, . . .

employees will be able to achieve a minimum of 30 percent above the standard. Now, this is our proposal and submitted in writing and discussed and negotiated with you and now you tell me Downer was here a couple of weeks ago and said 50 percent . . . of the people making above standard is satisfactory . . . . What kind of nonsense is that? You have our written proposal — . . . So don't try to beat us over the head with what Downer may or may not have said."

The Union's October 18 proposal substituted for the 25 percent-above-standard proposal the following:

> Section 10. An operator working at normal speed is rated one hundred percent (100%). One hundred percent (100%) productivity is attained without special effort if the operator is experienced on the operation and is applying himself normally.

At the ninth conference Weiss, going through the October 18 proposal, said, "We have also discussed the matter covered by Section 10, and that's not satisfactory for reasons heretofore given." Shapiro said, "This is an entirely new proposal, Mr. Weiss." Weiss replied that except for the changed percentages it was the same as in the Union's earlier proposal and was not satisfactory. Shapiro pointed out that the language was adopted without the change of a comma from the Company's bulletin. Weiss said that language appropriate for a bulletin was not satisfactory for a contract.

(f) *Union's right to timestudy jobs*

The Union's proposed Section 9 of Article III presented at the third conference also included the following: "The Union shall have the right to timestudy any job on which there is a dispute." At the fourth bargaining conference Shapiro commented that the Company had agreed to permit an independent timestudy survey to be made of certain jobs on which grievances were pending and he asked whether the same procedure would automatically follow in the future in regard to any grievance as to piece work. Weiss said, "Let's cross that bridge when we get to it. We have complied with your request. And when you make other requests, we will answer them." Shapiro pointed out that it had taken 3 weeks to get an answer to its request and said, ". . . and I don't want to go through a lengthy procedure in order to get a timestudy man." Weiss refused to make any arrangements for the future but said only that the Company would agree to reasonable requests. A short time later Shapiro brought up the above proposal for Article III. Weiss said that the matter was adequately covered in the old contract. Pressed as to the relevant provision, he said that the right to file a grievance, set forth in Article XV, implied the right to do anything necessary to process it. Shapiro said, "Let's say that in the contract," and he again pointed out that it had taken 3 weeks to get consent the last time because a Company official was away. Manning commented that Article III of the old contract dealt with the Union having access to the Industrial Engineer's records and Weiss said, "I knew there was something in there. Okay." Shapiro countered that the Union should not be expected to accept Company records on their face. At the fifth conference Shapiro asked why the Union should be compelled to go through the procedure of obtaining company agreement to a time study every time there was a dispute. Shawd replied that the Company had allowed timestudies. At the seventh conference Respondent informed the union representatives that a certain job which the Union wished to timestudy was to be run the next day and that they could have timestudy man there. The Union replied that one day's notice was insufficient to bring in an independent timestudy man. At the eighth conference Weiss admitted that the Union had the right to make timestudies on legitimate grievances but said that the Company had never refused that right to the Union and that a contractual provision was therefore not needed. The discussion of the provision closed with Weiss' expressing concern that the Union might put a paid employee in the plant, apparently just to stir up grievances. At the ninth conference Weiss said that the provision, then embodied in Article III, Section 11 of the Union's October 18 proposal, was not satisfactory in that form, but he added, "Perhaps we can work out something that will be."

(g) *Waiting time for piece workers*

The Union's proposal as to Article III included the following:

> Section 10. All employees who are required to wait in excess of five (5) minutes for materials, breakdown or other causes shall punch

> out on timework and be paid their base rate during the waiting period.

When Shapiro read the above proposal at the third conference, Manning said, "It is supposed to be on that basis now." Shapiro replied that employees had told him that when they had to wait for materials, or new jobs, or because of breakdowns, some foreman, either expressly or by implication, forbade them to go on timework. The Company officials expressed skepticism as to such happenings and complained that at times employees went on timework when they were supposed to be doing piecework. Shapiro said that that would be wrong also and said, "Why can't a procedure be set up to accomplish this, Mr. Manning? Anything that is fair. I think the Company has to have some control . . . ." At the fourth conference the problem was discussed further, the committee describing circumstances where it arose, and Company officials insisting that they did not want the condition to exist. At the eighth conference, when Shapiro brought up the proposal again, the following colloquy ensued:

> Mr. Shapiro: Mr. Weiss, we did submit a specific case on it.

* * * * *

> Mr. Weiss: You purported to submit some and we checked it out and it was not true; just like Mr. Downer's statement —

> Mr. Shapiro: You have not given us the results of your check out. Now do that and lets see.
>
> Mr. Weiss: Well, give us some specific instances where this has happened and—
>
> Mr. Shapiro: Here we go around the merry-go-round . . . .

Shapiro then asked the committee members present if they knew of specific cases, but Weiss said that the matter should be submitted in writing. Manning said, "Mr. Shapiro, there is no grievance filed on this particular case that you have —" The colloquy continued:

* * * * *

> Mr. Weldon: . . . . You received specific cases and you have promised to check it out. We know of no check out—
>
> Mr. Weiss: I don't recall any specific cases having been given . . . . while I have been here. Mr. Shapiro: You just said that you checked them out and found out it was not true.
>
> Mr. Weiss: No; I didn't say that. I said apparently they must have been checked out and found to be —. . .

Finally a committee member told of a recent instance where she had spent 45 minutes clearing up an error caused by her foreman but had not been told to punch out on timework. The company officials said that they would investigate that instance and pay the employee if it turned out that she was entitled to the 45 minutes. Weiss said, " . . . you pointed out one instance . . . out of 350 [employees] . . . Now, I don't think one swallow makes a summer . . . ." Shapiro repeated that Weiss said he had checked out other cases submitted but Weiss denied having said it and Shapiro proceeded to another topic. In the Union's October 18, 1965, proposed contract the clause was omitted.

(h) *Timestudy engineer as arbitrator*

The final clause in the Union's proposal at the third conference with respect to Article III was as follows:

> Section 11. The parties hereto specifically provide that any piece-work grievance reaching the step of arbitration shall be resolved through the appointment by the arbitrator, of a neutral timestudy engineer whose determination of the proper standard shall be final and binding upon all parties.

Shapiro said that only a timestudy engineer could properly evaluate testimony as to piecework grievances. Fryburger said that under the old contract there was nothing to keep the parties from agreeing that the arbitrator be a timestudy engineer, to which Shapiro replied that there was nothing to keep an arbitrator from disagreeing. Fryburger then said that the third arbitrator, himself, could call in a timestudy engineer and Shapiro suggested that that be put into the contract. Fryburger objected, saying that the arbitrator might not feel that he needs one and that he could make the decision himself. The issue was discussed further at the fourth and eighth conferences, with the Union and the Company advancing substantially the same arguments. In its proposed contract submitted on October 18 the Union dropped this proposal.

(i) *Company proposals on piecework*

At the first bargaining conference Respondent submitted a proposal as to probationary employees and as to time rates for piecework jobs which, after some discussion, it withdrew, stating that the purpose was to revise the drafting. At the second conference it submitted a revised proposal,[18] which added a new sentence to Section 5 of Article III, and added a new Section 8. The proposed sections read as follows:

> Section 5. A piece-work employee assigned to a job which is paid on a time work basis, shall receive the classification rate for the job on which he is actually working. A piece-work employee assigned to a job normally worked on a piece-work basis, but for which a standard has not been established shall be paid the base rate[19] for the job.

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[18] Respondent's Exhibit 1. The withdrawn proposal was Respondent's Exhibit 4.

[19] The proposal submitted at the first conference, Respondent's Exhibit 4, had "time rate" instead of "base rate" at this point.

> Section 8. All new employees shall serve a probationary period of ninety (90) days and during such probationary period, shall be paid the federal minimum wage; however, an employee may earn in excess of the minimum wage during his or her probationary period in accordance with the Company's established standard hour piece-work system, with the hours of accomplished work multiplied by the base rate for each job classification as shown by the Company's records and as developed by the Company from time to time.

Respondent explained that the purpose of thus limiting probationers' pay was to protect experienced employees working at time rates from the unfairness of receiving the same pay as the inexperienced probationers. The Union representatives requested that the matter be held for discussion since it fixed what amounted to apprentice rates and thus was part of wages, which Respondent had excluded from negotiations at that time. With respect to the new sentence in Section 5, which embodied current practice, the Union representatives indicated that it seemed satisfactory. The Union's proposed contract submitted on October 18 included the first sentence of the above Section 5, which was taken from the old contract, as Section 5 of its Article III, and it included in its proposed Section 8 of Article III a subparagraph reading as follows: "b. Pending such retiming and the establishment of a new Standard, the employee shall be put on time work and paid at the base rate for the job." At the ninth conference Weiss objected to placing that clause in Section 8 rather than 5 and also stated that the particular language was not satisfactory. The section about probationary employees did not come up for discussion.

2. Wage rates

In its initial proposals the Union included as the first item, "Substantial wage increases, with piece work rates adjusted to conform with any general wage increases negotiated." At the first bargaining conference Weiss stated that Respondent had carefully considered the Union's proposals but that for competitive reasons it did not consider any increase in labor cost advisable at that time. Respondent did, however, discuss at length at the first, second and third conferences, competition from foreign firms and from American factories in Puerto Rico. At the fourth conference Shapiro asked if Respondent was prepared to make "any proposal at all" on the subject of the Union's proposal for a "substantial wage increase." Weiss replied, no, mainly by reason of "competition and much of it is foreign competition." He stressed that Respondent made no claim that competition made it impossible to support a wage increase, only that it was not advisable. He named a number of companies that had established plants in Puerto Rico, pointing also to competition from imports. He said that the Company was operating at a profit but with increasing difficulty, and that the Company could halve its cost of operations by establishing a plant in Puerto Rico, as competitors had done, to take advantage of low labor cost and tax advantages. Respondent's officials admitted that notwithstanding Puerto Rican competition its sales were increasing, but they attributed that to an efficient, agressive sales force and, moreover, had reservations as to whether the growth had been as great as it should have been. Weiss said, ". . . somewhere down the line, to get a contract and to avoid all of this time spent on negotiating, the Company may possibly stretch a point and offer some character of increase. But at this point we are too far apart on so many other matters . . ." At the fifth conference, with Weiss absent, Shapiro commented that after 3½ hours no progress was being made and suggested, "maybe if we can resolve the economic issues the other things can begin to fall in line." He called attention to a wage increase and paid holidays recently granted by a competitor of Respondent's in Yoakum, to the continuing increase in the cost of living, and to the fact that the employees had not had a wage increase for 2 years. Shawd replied that, " . . . the Company was not sold on any increase in wages and benefits." At the sixth conference Weiss said that when the parties were "together on the other important things in the contract and in order to get . . . a . . . contract the company may . . . see fit to make some concession that would involve additional labor costs, however ill-advised such an increased labor cost might be considered by the Company . . . . But an effort of that kind at this time . . . would accomplish nothing because we are so far apart on so many other things." Downer said: "We are not moving . . . . Turn around and talk to us about money and see what kind of answer you get. . . . lets see what happens to the rest of this stuff." Weiss said that an increase in labor cost might be bad not only for the Company but for the employees. He pointed out that it would not help the latter if it impaired Respondent's ability to compete with Baronet, one of the firms with a factory in Puerto Rico, since the employees would be laid off. He stated, also, "that . . . any sort of proposal involving wage costs wouldn't get us anywhere. . ." At the eighth conference Shapiro asked if the Company was prepared to make any proposal on wages. Weiss replied that it was not, because it had "to be very careful with reference to increasing its labor costs" because of foreign and Puerto Rican competition. He said:

> At some time when substantial agreement has been reached on the contract terms, the Company may in an effort to reach an agreement with the union make some wage proposal . . . .
>
> The Company . . . doesn't think the wage proposal at this time would accomplish anything . . . .

Shapiro asked whether the company had considered the possibility that a proposal as to wages and other economic factors might help eliminate or narrow other areas of disagreement. Weiss replied that the Company had considered that and that the real deadlock was on matters other than wages. He said that if the Union said that Respondent's contract was satisfactory, subject to agreement on a wage increase, "the Company would go into executive session and probably come up with a wage proposal." But, he said, the Company thought that if it made a wage proposal, it could not obtain the kind of contract it needed "to protect our standard hour system . . . ." Later in the conference Shapiro asked if Respondent would agree to an increase of 15 cents an hour. Weiss said he did not think any increase the Company submitted would amount to that much but asked if the Union would accept it. Shapiro said it would. Weiss then asked which labor-cost items the Union would waive if the Company did agree to 15 cents. Shapiro asked, ". . . are you indicating to us that if our total wage proposal was in the area of 15 cents that it is something the Company would seriously consider?" Weiss replied, "Well, the Company would seriously consider anything that you proposed, of course; it always has." Shapiro said that the Company had refused time and again to make a proposal on wages. Weiss replied that Respondent's reason had been explained and said, "Now what I am trying to find out from you is which of the other cost items would be waived if the Union agreed to accept 15 cents?" Shapiro replied, ". . . you obviously do think it is good bargaining to offer to sell a pig in a poke." When Weiss protested that he was merely trying to get a definite proposal from the Union, Shapiro replied, "We haven't had any kind of proposal from you, definite or indefinite." Weiss replied by urging that the Union submit a complete contract proposal, commenting, ". . . and when we set the two written documents down side by side we can tell definitely where and in what respect we are in disagreement . . . ."

At the ninth conference Shapiro, in answer to the Mediator's question, said, "I'm willing to become more definitive about the economic issues which are basically wages and holidays providing the Company is willing to negotiate these questions. . . . If Mr. Weiss would . . . say we can reach agreement on wages and still have the other items open I'll discuss wages." Weiss said, "I don't think we can accomplish a thing that way."

3. Overtime

Article IV of the old contract, entitled "Hours of Employment and Overtime," defined the workweek (Section 1), provided for time and a half for work in excess of 40 hours in any workweek (Section 2), for work in excess of 8 hours in any day, except for maintenance and shipping department employees (Section 3), and for Saturday and Sunday work except for maintenance employees (Section 4), and it specified the method of computing overtime hours (Section 5). At the first conference Respondent submitted a proposed amendment of Article IV[20] which left intact three of the sections but deleted the two sections providing for premium pay for Saturday and Sunday work and for work in excess of 8 hours in any 1 day. The proposal was withdrawn without discussion and Respondent's proposed contract submitted on July 28[21] restored Article IV as contained in the old contract.

At the eighth conference Shapiro asked what the Company's practice was when overtime work was scheduled for a Saturday with respect to allowing participation by employees who had missed work during the week. Tolbert stated that at Welhausen employees who missed 2 hours or less work would not be foreclosed from Saturday overtime, but that during the previous year, as a result of excessive overtime, he had instituted a rule that an employee who was absent more than 2 hours during the week without adequate reason would not receive the overtime work. The rule had been instituted without discussion with the Union. Shapiro inquired what reasons for absence the Company accepted as adequate to permit an employee to share in overtime. He said that he did not want to argue as to the Company's policy, commenting, ". . . I am really inclined today to accept the Company's reasons, whatever they may be, for denying this overtime to their employees," and he said that the Union was willing to leave to the Company's own determination those reasons that could not be written into the contract as acceptable to the Company. Tolbert said that the following reasons would be deemed adequate: Visiting a doctor, supported by a written statement, participation in negotiating sessions, death in the immediate family, required appearance in court, injury on the job. Manning said that Western had never set a rule on the matter, but that he had no objection to such a provision. He said, "As a matter of fact this clarifies a point and I am glad to see it." Shapiro said that with that change Article IV was satisfactory. Weiss again urged that the Union submit a complete written contract proposal embodying what the Union wanted under Article IV. However, he said, ". . . We agree to try to write out, add to Article IV something to cover this subject . . . ." Summarizing, he said that the Union had agreed to leave to the Company's determination reasons other than ". . . doctor, death in family; court appearance, jury duty. . . . a negotiating session." Shapiro raised the question of discussion of grievances. Weiss concluded the discussion by saying:

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[20] Respondent's Exhibit 5.

[21] Respondent's Exhibit 10.

> I mean that is a clause that could be muchly abused and you have got to be very careful in the contract language in that respect. Okay; we will try to write something on that.

Weiss' summary for that conference states, "Weiss agreed to write something on the above provisions."

The proposed contract submitted by the Union on October 18 included Article IV of the expired contract with the following addition to Section 4:

> Employees who are absent for any reason for 2 hours or less during the week shall be fully entitled to share in overtime work on Saturday or Sunday. It is further agreed that employees who are excused from work for the following reasons shall be fully entitled to share in overtime work on Saturday and Sunday:
>
> 1. Attendance at negotiations with the Company.
> 2. Death in the immediate family.
> 3. Required appearance in court.
> 4. Jury duty.

At the ninth conference Weiss objected that the Union's proposal implied an obligation by the Company to divide overtime equally, which it did not agree to. The following colloquy ensued:

> MR. SHAPIRO: Do you have a counterproposal?
>
> MR. WEISS: Not at this time. We haven't had a chance to draft it. We got this Monday. . . . I mean management people got it yesterday.
>
> MR. SHAPIRO: You said that management would throw off a proposal on this line because we discussed it and we agreed to the essentials of it, and you said the management would draw up a proposal on it. Now, we attempted to do that. You find it unsatisfactory.
>
> MR. WEISS: That's right. I will —
>
> MR. SHAPIRO: Now, you tell us you haven't had time to do this.
>
> MR. WEISS: I mean there's no use being abusive about it.
>
> MR. SHAPIRO: I'm not being abusive about it. These are the same kind of tactics that you have engaged in for months now.

MR. WEISS: Here you go off on your old broken record again. Let me continue. We will attempt, to draw up some such provision as this, but it will make it clear that the Company does not contractually guarantee that everybody gets the same amount of overtime

4. Vacations

Article VI, entitled vacations, provided in sections 1, 2, and 3, respectively, that employees who, on December 31 of any year, had completed 10 months, 5 years, or 15 years of continuous service and were on the payroll at that date, were entitled to vacations of 1, 2, or 3 weeks, for which they were to be paid, 2 percent, 4 percent, or 6 percent, in each case, respectively, of their total earnings during the year. The article also contained the following provisions:

> Section 4. Payment for all vacations shall be made when the vacation begins . . .
>
> Section 5. The Company will determine when vacations are to be taken . . . .
>
> Section 6. An employee resigning from the Company for any reason other than personal health or family health problems shall forfeit all vacation rights. An employee discharged for cause shall forfeit all vacation rights.

Section 7. An employee who takes a vacation with instructions to return to work, and who does not return to work, will be considered as having resigned from the service of the Company, effective the last day of vacation.

Section 8. No allowance will be made for holidays falling within a vacation period.

Section 9. An employee laid off for sixty (60) calendar days or more will not receive vacation pay.

Section 10. An employee absent from work for his own convenience in any vacation year for more than two hundred hours (200) shall lose one-half of his vacation pay and for more than two hundred eighty hours (280) shall lose all of his vacation pay.

Section 11. If an employee who has had ten (10) months service during the current calendar year, on December 31 of any such year, but is not on the payroll on such December 31 due to a layoff or authorized leave of absence, is re-employed or returns to work within sixty (60) days after his layoff or within sixty (60) days after the beginning of his authorized leave of absence, and is on the payroll at the start of the designated vacation period for his department, he shall be entitled to his vacation.

At the first bargaining conference Respondent submitted as a proposal[22] a verbatim copy of all 11 sections of the old Article VI except that it eliminated from Section 6 the eight words, "other than personal health or family health problems." Weiss explained that this was the only change proposed in the article and that it would eliminate the difficulty which had arisen under the old contract in that inquiry had had to be made as to whether health problems were sufficiently serious to justify resigning. The proposal was not discussed further but in Respondent's proposed contract submitted on July 28[23] the eight words were restored.

At the eighth conference Shapiro asked, with reference to Section 6 of Article VI, whether a person off sick was deemed to have resigned. Weiss said that such a person would be given a leave of absence, ". . . I guess you would call it a temporary resignation." He suggested that the Union clarify the matter in the contract proposal it was to submit and that the Company would consider it. Shapiro replied that before submitting anything he had to determine current company practice. He next suggested that Section 7, relating to failure to return from vacations, be amended to make provision for persons who were prevented from returning on time by accidents and the like. Weiss said it should be put into the Union's contract proposal; that he thought it unnecessary, but that Respondent might accept it. Shapiro proposed the elimination of Sections 9 and 10, relating to extended layoffs and absences. He argued that since vacation pay was based on earnings, employees were automatically penalized sufficiently for absence without those sections. Weiss said that an employee off on leave of absence because of illness, would be off ". . . for his own convenience — at least as far as the Company is concerned. . . . I mean you're dealing with vacation rights. . . ." He argued that a vacation, according to Respondent's philosophy, was to reward people who had worked and were tired and needed rest, or to be "recharged"; and that if they had not worked for any reason, their vacation should be affected. Shapiro asked if Respondent intended by its proposal that any employee absent the specified hours for any reason whatsoever should be penalized as provided in Section 10. Weiss replied: "If they are absent, maybe it should say for any reasons, not simply for their own convenience . . . . I would be willing to leave out 'for his own convenience' . . . . And I make that as a counterproposal." Shapiro commented, "You've made a counterproposal to your own proposal, is that right?"

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[22] Respondent's Exhibit 6.
[23] Respondent's Exhibit 10.

The Union's proposed contract submitted on October 18 modified Article VI as follows: (1) it eliminated from Sections 1, 2, and 3 the words "and is on the payroll on that date"; (2) it eliminated Sections 8, 9, 10 and 11; and (3) it added at the end of Section 7 the words "except in the case of an emergency." At the ninth conference Weiss made no comment about the addition to Section 7 but he objected to the proposed eliminations. He pointed out that Section 11 had been a compromise on the issue and that under it employees not on the payroll on December 31 would receive their vacations if reemployed or returned to work within 60 days; and that the disqualifying provisions of Sections 9 and 10 had not caused any particular problem. He also said that Respondent had been working on a simplification of the vacation article but had not reached agreement, and "Sometime in the future we might be able to submit a vacation clause which would maybe simplify the existing clauses."

5. Holidays

The expired contract provided in Article VII for six recognized holidays (Section 1) and for premium pay for work performed on those days with a minor exception (Section 2). The Union's initial proposals included as item 2 five paid holidays. At the second conference the Union handed Respondent the draft of a proposed new Article VII which left Section 1 of the old contract unchanged except to provide that the recognized holidays be paid holidays. Respondent objected that the proposal would increase labor costs, to which at that time it was not prepared to consent. On July 19, at the fifth conference, Shapiro commented that Respondentent's employees had celebrated July 4 by losing a day's pay, whereas a competitor of Respondent's in the same town had granted six paid holidays. Shawd replied that the Company "was not sold on increasing wages and benefits." At the sixth conference the Union changed its proposal from 5 to 6 paid holidays, at the same time withdrawing its proposal for one week's paid sick leave. The Union pointed out that Respondent had started paying for holidays at its plant in Fort

Worth. Weiss said that that operation was different and faced different problems. He insisted that until agreement was reached on the "non-economic" parts of the contract the Company could not agree to any increase in labor costs. At the eighth conference Weiss again stated that position and also said that the Company believed that most of the employees preferred increased wages to fringe benefits.

The Union's contract proposal of October 18 included a provision for six paid holidays. At the ninth conference on October 20, Weiss said that the proposal was unsatisfactory, commenting that the Company felt it advisable to keep labor costs in line in view of competition and to attempt to limit as far as possible the cost of fringe benefits, that one of the great hazards that management had was building up too many fringe benefits which cost money and came to be taken for granted, and that Respondent considered it advisable to place any labor-cost increase in wages rather than fringe benefits. Shapiro asked if Respondent's opposition to paid holidays was based not on cost but on principle, and whether Respondent would grant them in lieu of part of any wage increase it might eventually be willing to give. Weiss said that although it was not solely a matter of cost, it was a matter of management judgment as to how best to spend the money represented by labor cost.

6. Ventilation

In its initial proposals the Union included as Item 8, "Provide adequate ventilation in work rooms." At the first bargaining conference Weiss asked if there were problems in the area of ventilation. Shows asked for an explanation, stating that the Company had had no complaints. Two committee members said that more fans were needed at their work places, and that some employees brought their own fans. Weiss said, "Doctors tell us now it is real good for us to sweat." Employees suggested that fans be moved and that stacked boxes blocking air circulation be removed. Weiss said:

> I have found from experience it is impossible to satisfy, particularly women in our office — . . . they are constantly complaining that it is too hot or too cold. And every girl in our office has a sweater there, and of course the men are — usually complain it is too hot. They turn it down to please the girls and the men complain and if they turn it up to satisfy the men, the girls complain and I have solved it by just telling the girls to bring sweaters and they just put on the sweaters.

Elwood replied, "I want to make it clear we did not make a proposal for air conditioning." Weiss closed the discussion by saying that the company executives would check into the situation and find out what could be done without too much cost, and that the Company did not accept the Union's proposals.

At the fourth conference, 2½ months later, Respondent's officials reported that they had not got round to checking into the ventilation problem. Shapiro discussed the construction of the saddletree shop and asked

Respondent's officers if anything could be done. Weiss said that Respondent should get a ventilation engineer and take temperature readings. He said, "People do better work when they are comfortable . . . . We don't need a contract." Shapiro said he did not know whether the Union would accept Article X without something on ventilation. Weiss repeated at length his comments on complaints by girls in his office about the air conditioning. Shapiro also requested Respondent to check the accuracy of reports that employees had been ordered to buy their own fans. Respondent's officials said that the uncontrolled use of individual fans caused safety hazards and that they were going to "try to engineer the place better." After further discussion, including comments by committee members about their own hot and stifling working conditions, Shapiro suggested that Article X include a clause, "that the Company will continue to make every reasonable effort to provide adequate ventilation in the summer and adequate heat in the winter." Weiss objected that there are always disagreements about what is adequate, but said, "We will consider that."

The Union's proposed contract submitted on October 18 added at the end of Section 1 of Article X the following: "The Company will provide adequate heat and ventilation at all times." At the ninth conference Weiss said that under that clause the Union, through arbitration, could compel the Company to install air conditioning where not economically feasible. He said, ". . . and there is no problem . . . . It was pointed out at one of the earlier meetings that plenty of heat and plenty of ventilation, so, an unnecessary provision

. . .," and he proceeded to tell about what he termed a ridiculous decision by a senile arbitrator, selected through the Federal Mediation and Conciliation Service, on a grievance about division of overtime. Shapiro said that if a possible demand for air conditioning was the Company's objection the Union could modify its proposal. Weiss said that that was only one example, that the Union might come up with some unreasonable ventilation plan. A committee member commented that nothing had been done about ventilation in the Saddle Shop, where the temperature sometimes reached 110 degrees at night. Manning said that the Saddle Shop had fans but that not much could be done under the existing conditions, and that there was not enough space for more fans. Another employee, Bluda, said that merchandise stacked high near his department had been moved once to allow ventilation, but that it was again stacked to the ceiling, cutting off all breeze. Manning replied that that ". . . was never actually brought to my attention, . . ." and when Bluda reminded him that he had spoken to him about it in the shipping room. Manning answered, "That wasn't the proper method of handling things. You should have went to Jimmy . . ." Tolbert said that that was the first time he heard that the merchandise had been stacked up again and he said, ". . . we will have to try to knock it down again." Manning also reported that the Company had found that a top vent in the Saddletree Department was not working and that the condition had been corrected the next day. Company officials pointed out again that individual fans were hazardous. Shapiro said, ". . . I certainly don't want to get into the question of how and why the particular methods you use to provide adequate ventilation." Weiss commented that in his office the women complained that it was too cold and the men that it was not cold enough. He said conditions at Tex-Tan were pleasant compared to working on the highways or in a boiler room. Shapiro said, "We are agreeable to any kind of general language which will indicate that the Company is responsible for ventilation . . . ." The Mediator asked whether the insertion of the words, "economically feasible," which someone had used, would be an area of settlement. Weiss objected that that was too general and that binding the Company with such a provision "could get into all sorts of sticky problems."

7. Seniority

Article XI of the old contract, entitled "Seniority," provided in part as follows:

> Section 1. The Company recognizes seniority, which shall be based upon the length of continuous service with the Company according to the Company's records, as an important factor to be considered by it in its promotions, demotions, layoffs, and recalls after layoffs. It is understood, however, that the Company may also consider ability to perform the job, efficiency, capability, and performance of duty in the past.

The article also provided that the Company would furnish the Union with the seniority list every 6 months, that seniority was to be by department but that if a job was transferred to another department an employee transferred with the job would have his seniority transferred to the new department. The final clause of Section 7 of the article included the following *proviso:*

> Provided that in the event of a layoff, an employee with more than 5 years seniority may make application to the Company for an available, vacant job in another department and if, in the opinion of the Company, the employee may be given a job in another department without loss of efficiency or fairness to other employees, a job in such other department may be permitted; . . .

At the second conference the Union proposed the following changes for Section 1 of Article XI and for the proviso of Section 7:

> Section 1. The Company recognizes seniority, which shall be based upon the length of continuous service with the Company according to the Company's records, as the factor to be considered by it in promotions, layoffs, and recalls after layoffs. It is understood that the Company may also consider as an important factor, ability to perform the job. * * * * *

> Section 7 provided that in the event of a layoff, an employee with more than two (2) years' seniority shall be permitted to exercise his accumulated company seniority to displace the least senior employee in another de-

> partment provided such employee is reasonably qualified to perform the job; . . .

These proposals were discussed at length at several conferences, but both parties maintained their respective positions. At the fourth conference Shapiro brought out through Tolbert that a man transferred from one department to a different job in another department would, under the old contract, lose his seniority even though the transfer was for the convenience of the Company. Shows, however, stated that so long as the transfer was within Welhausen and not to or from Western, he would carry his seniority with him. Shapiro asked if that could be stated in the contract and Weiss said that he thought a provision like that could be worked out. In its proposed contract submitted on July 28[84] Respondent retained Article XI of the old contract unchanged in substance, except that the five-year requirement of the *proviso* clause of Section 7 was reduced to three years and except, further, that the proposal included the following new section:

> Section 9. The only other exception to the rule that seniority shall not be plant-wide but by departments only is as follows: In the event an employee is transferred to another department by the Company for the convenience of the Company, he may be allowed to keep his seniority that he has accrued in the department from which he has transferred; provided, however, that the application of this provision in

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[84] Respondent's Exhibit 10

> the opinion of the Company will not cause undue injustice to the seniority rights of the employees in the department to which the transfer is made.

The Union's proposed contract submitted on October 18 embodied its proposal as to seniority made at the second conference, which has already been described. At the ninth conference, Shapiro stated that the proposal provided for departmental seniority down to the point of the layoff of an employee with more than 2 years' seniority reasonably qualified to perform the job in another department. Layoffs of employees with 2 or 3 years' seniority were rare. Weiss objected that under the Union's proposal the Union could "bump all over any of the factories . . ." in the event of layoff, whereas under Respondent's an employee had to have 3, not 2, years' seniority and even then could merely apply for a vacant job in another department.

8 Arbitration

Article XVI, entitled "Arbitration" provided that any grievance remaining unsettled after the grievance procedure set forth in Article XV could within 10 days be presented in writing to two arbitrators, one appointed by the Company and the other appointed by the Union, and that if the two arbitrators were unable to agree they should choose a third, disinterested, arbitrator and the three should settle the controversy. The article further provided as follows:

> Section 2. The power of arbitrators herein provided for shall be comparable to that of a United States Court of Appeals reviewing a decision and order of the National Labor Relations Board and if the action taken by the Company or the decision made by the Company is supported by substantial evidence, such action or decision shall stand, the arbitrators having no power to or authority to disturb it.

Arbitration was limited to the matters enumerated in Article XV as subject to the filing of grievances "and within the framework of this agreement . . . ."

The Union's initial proposals included "Improved grievance and arbitration procedure to provide for a method of selecting an impartial arbitrator." At the first bargaining conference, when Elwood started to explain the Union's position, Weiss interrupted him, saying:

> . . . Our position is that the grievance and arbitration procedure in the existing contract appears to work very well . . . . [T]he contract has been in existence for two years and I think that there has only been one case that went to arbitration . . . . I think that is a pretty good batting average. And it sort of speaks pretty well of the grievance and arbitration procedure set forth in the contract. Apparently the parties were able to work out pretty well most of their grievances without any trouble. I can't recall a similar case involving as many

> employees as are involved here, where in a two-year period you only have one arbitration. It is kind of a world record.
>
> . . . . When you have got something working as good as that is, don't mess with it.

Elwood explained that the Union's proposal had to do only with the arbitration procedure, not the grievance procedure. Weiss asked the Union to "submit us the specific proposals for the changes that you want, we will be glad to give them consideration . . . ." He said:

> . . . The Company . . . takes the position that it is wise and advisable to have an arbitration . . . decided by local people — people in this area — that know the conditions and know the circumstances and know local conditions and they are in a better position to decide these things fairly and reasonably than somebody from way off. They have a personal interest in seeing that Tex-Tan keeps going, that it provides city employment out here, that the people have good jobs and they have an interest in settling these things in a fair way so they leave no bad taste in anybody's mouth. . . .

Elwood urged that the agreement have a fair method of choosing the third arbitrator when the parties reached an impasse. Weiss replied that the American Arbitration Association and the Federal Conciliation Service, proposed by the Union, were not acceptable but offered to consider them or anybody else the Union proposed. He objected to having as arbitrators people with experience in labor relations work. He commented that arbitrators "appointed," by the American Arbitration Association and the Federal Mediation Conciliation Service, in order to avoid the possibility of being rejected in the future as prounion or pro-employer, decided cases first for one side then for the other, irrespective of the facts, and that many were "senile" and ". . . just couldn't understand. . . ." Elwood pointed out that Weiss had failed to comment on the need to provide a way out of an impasse. Weiss said that such a provision was unnecessary and that the method prescribed in the old contract was used in business transactions every day. However he also said, "We will consider any agency that you propose," and, "We will consider any proposal . . . ."

At the second conference Elwood presented a proposed new Article XVI, which eliminated Section 2, the substantial-evidence section of the old contract, and revised Section 1 so as to provide for the naming of a permanent arbitrator in the contract. He said that that was an alternative to using the American Arbitration Association, which the Company had objected to. He commented that Section 2 was unsatisfactory because it was "lawyers' language" which most arbitrators would not know how to apply; and Nelson commented, "It, in effect, takes all power away from the arbitrator." Fryburger replied that the language had precise, well-established meaning which the parties' counsel could make clear to an arbitrator; and that the arbitrator would have power, since the evidence supporting the Company's decision had to be substantial. He said that the section was needed as a "cushion on the power of the arbitrator." At the fourth conference, when Shapiro introduced the subject of arbitration, Weiss commented, "Here again, the proof of the pudding is in the eating. We have had the existing arbitration clause for 2 years and we have had one arbitration." Shapiro replied, "We have been unable to use the arbitration clause because we have been unable to agree upon an arbitrator. . . ." and he said that the Union was willing to agree to any impartial means to select an arbitrator, not only those it had already suggested. Weiss said, referring to a pending grievance, that the Company arbitrator had suggested 20 names as the third arbitrator on the grievance, "but . . . apparently the Union just, probably for the purpose of these negotiations, just arbitrarily refused to select any of these people and these people are prominent." He denied Shapiro's assertion that the 20 people in question were biased towards management, and he started to go through their names. He named a retired merchant, a clergyman, a man "with" the Yoakum Federal Savings and Loan Association, the principal of the Yoakum High School, the manager-owner of a Yoakum five and ten cent store, the president of Yoakum National Bank, and the head of a local insurance company. The union representatives were laughing and Shapiro explained to Weiss, ". . . Any body in this room, with the possible exception of yourself, knows that these people are biased towards management." Weiss and Shows protested at this assertion, particularly with respect to the clergyman. Weiss went on to say that the union arbitrator had finally said that he would accept a lawyer from one of the big Houston law firms, but that when Respondent nominated such a man, the Union rejected him. He said, "I mean if you are going to be unreasonable about it, well naturally, you are not going to arrive — I think the company arbitrator . . . himself, is a very reasonable man . . . ." At the fifth conference, with Weiss absent, Shapiro and Elwood discussed the matter with Shawd, who protested that no one could have any complaint about the clergyman suggested by the Company. Shapiro asked what the complaint was about the clergyman nominated by the Union to select the third arbitrator. Shawd replied that that clergyman was notoriously biased. Shawd, without making a proposal, broached the idea of a rotating panel of arbitrators. The Union representatives said that the panel idea would be acceptable but objected to limiting the arbitrators to the Yoakum area. Shawd said, "Now, my real thinking about arbitration is get the doggone thing, get the contract so much in black and white so that both sides understand it and then . . . there is practically nothing that you can think of, left to go to arbitration." Shapiro said that he agreed with Shawd, but added, "But many times when we have specifically proposed things . . . designed to . . . [what] you have said you don't need it . . . Even though you are doing it now [you have said] you don't need it." When the union representatives pointed out that Weiss had rejected a proposal that the Union have the right to bring in a timestudy man when there was a dispute as to piece work, Shawd, who apparently was unaware that Weiss' argument had been that the Union had the right without the provision, replied that it would invite "a lot of meddling," and that its omission constituted specific provision. With respect to Section 2 of the old contract, the "substantial evidence" section, Shand said that it was needed in order to ensure that the Company would be managed by the Company and not by arbitrators who did not understand the Company's operations.

At the eighth conference Shapiro said that the lack of an effective endpoint to the grievance procedure made it fruitless to attempt to negotiate a grievance with the Company. Weiss replied that there was an arbitration pending at that very time in which a third arbitrator had been agreed upon by the Company and the Union. Shapiro replied, "The third party was agreed to reluctantly by the Union because we finally had to pick a company lawyer in order to satisfy you."

The Union's proposed contract submitted on October 18 included the arbitration article of the old contract with two changes. It eliminated the "substantial evidence" section, and it added at the end of Section 1 the sentence: "Should the two arbitrators representing the Company and the Union fail to agree upon a third disinterested arbitrator, the third arbitrator shall be designated by ______." At the ninth conference Weiss stated that that proposal was unsatisfactory.

9. Miscellaneous Subjects

Prior to the first bargaining conference the Union learned of a new operation of Lee Tex Rubber housed in a different building in Yonkers from the rest of the plant and known as the Imperial Hereford Saddle Factory.

Respondent's departments were referred to interchangeably as departments or factories. Imperial was not a separate corporation but was Division 15 of Western. At the opening of the first bargaining conference the Union inquired whether "Imperial Leather" was a division of Tex Tan Leather. Weiss replied that it was a newly established company, "related to Tex-Tan" but located at a different place. He said that there was question in his mind whether it was in the unit and suggested that it be deemed not in the unit. The Union stated its position to be that Imperial was in the unit and that the Union was bargaining on behalf of those employees. Weiss said, "We can keep that open." At the second conference Elwood commented that the Union wanted Imperial listed among the departments in Article XI dealing with seniority. At the third conference Elwood stated that he wanted the question clarified. Philip Wellhausen stated that Imperial was "an operating division of Western." Fryburger said we will put a hold on that." He said that the Company was not refusing the Union's proposal but was still exploring the question. At the fourth conference Shapiro raised the question again. Weiss replied that Imperial was not part of the contract unit and that he did not know whether the Company had reached a decision as to including it, since there had been no election. Shapiro asked when a decision could be expected in view of the fact that the Union had been, asking this now for the better part of three months." Weiss said, "Well, we will give you a decision in due time." Shapiro pressed the question insistently but was unable to extract any kind of commitment as to when the Company would give its answer and finally gave up and went to something else. At the fifth conference, with Weiss absent, the Union again asked for the Company's answer. Shawd said that the Company had question about it and wanted to allow Weiss to "come up with a definite answer on it," since he was an attorney. Shapiro said, "Frankly it appears to us that Mr. Weiss was playing games with the question. I don't look at this as a bargaining point." Shawd agreed that it was not a bargaining point, but he refused to give an answer. Pressed as to whether an answer could reasonably be expected at the next meeting, Shawd said that he would rather stand by Weiss' promise of an answer "in due time" but ultimately said that he thought the answer could be given within a week. Three days later, at the sixth conference, Weiss said, "The Company is disposed, willing to include Imperial Saddle in the unit . . ." He said that it was physically more separated from the rest of the plant than other departments not in the plant proper, but said, ". . . the Company has decided to, in an effort to reach an agreement with you that they will make no issue of the matter and we will just put it in . . ." Later during the conference, after the Company persisted in its rejection of the Union's various proposals, Downer demanded, "Is there anything that you have to offer?" Weiss replied that the Company had offered to extend the old contract and, moreover, had ". . . made what apparently is an important concession to you on Imperial, giving the Union 30 odd potential dues payers." Downer replied that the Union did not consider the Company's acquiescence a concession.

In its initial proposals the Union included as item 4

"District 5 Health and Welfare Insurance as per attached schedule of benefits . . . ." At the first conference its representatives explained what they deemed to be the advantages of their plan over the Company's. They requested information about the cost and coverage of the Company's insurance plan, which was furnished promptly by the Company. The complete contract proposal submitted by the Union on October 18 incorporated the insurance article of the old contract unchanged.

At the first bargaining conference, when Weiss went through each article of the old contract to identify the areas of disagreement, the union representatives stated that Article V, XVII and XVIII, entitled, respectively, "Management," "Scope of Agreement" and "Non-discrimination," were satisfactory. At the fourth bargaining conference when Weiss repeated the process, Shapiro stated as to Article V, "If you said the union approved it, I have no objection," but he added, "It looks like a clause was written by the National Association of Manufacturers."[33] When Weiss came to Articles XVII and XVIII, Shapiro stated that they were not satisfactory. As to Article XVII he asked, "How can I say this about the scope of the agreement until we know what the agreement is?" As to Article XVIII, he said that Section 2, prohibiting the threatening, intimidating or coercing of employees should apply to the Company as well as to the union. At the eighth conference, when Weiss, over union objection, again repeated the article-by-article process, Shapiro stated that Section 3 of the Management article was to be held for discussion, since under the law a union had the right to negotiate as to the suspension of operations. He also proposed that Section 4 of that article be amended to provide that any change, modification, or amendment to the Company rules and regulations be negotiated between the parties. Weiss raised question as to how an agreement could ever be reached if the Union, after agreeing to a clause, withdrew its agreement. He said that Section 4 was fair and the Company would stand on it. Shapiro stated that the scope-of-agreement article might be satisfactory but that it required discussion, but he took the same position as previously with respect to the "non-discrimination" article. In its complete contract proposal of October 18 the Union adopted, unchanged, the language of the old contract with respect to the articles on "management" and "scope of agreement," but provided in Section 2 of the "non-discrimination" article that neither the Union nor the Company would coerce any employee into joining or not joining the Union. Weiss insisted that the change was unnecessary, since the matter was covered by law.

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[33] The management-prerogative clause, among other things, made the Company the "exclusive judge" of all matters pertaining to places of business and contracting or subcontracting work, and gave the Company the "unrestricted right and privilege to suspend or cease, at its discretion, the operation of such plant . . . without any liability to . . . the employees." It also provided: "Section 2. Any and all rights, powers, privileges, prerogatives and authority which the Company had or possessed prior to its having entered into contractual relations with the Union, are retained or reserved by the Company, excepting only those specifically and expressly abridged or modified by this agreement."

At the ninth conference Weiss proposed a new article, entitled "non-waiver," reading as follows:

> It is understood that the Company has in the past and may from time to time in the future for humanitarian business or other reasons waive requirements for benefits and privileges under this contract and grant employees benefits which under the strict terms of this contract they would not be entitled to. It is specifically understood and agreed that no such waiver or deviation from the strict terms of this contract shall in any way bind the Company or in any way change any of the provisions hereof, and it is specifically understood that no such waiver or deviation from the strict terms of this contract by the Company shall be construed as to establish any practice in any way requiring the Company to grant similar waivers or to make similar deviations in the future. It is the intention of the parties that all such waivers and deviations shall at all times be and remain purely discretionary with the Company.

Shapiro commented: "It means that the Company is asking for complete right to discriminate against anybody they choose or to favor those whom they choose." Weiss said that that was a misrepresentation of the provision, and that the Union's position would prevent the Company from exercising a humanitarian attitude as in the past. He said that exceptions to the rules would be made only in "very unusual cases." Shapiro said that all that needed to be said was, "Fair and equal treatment for all employees." He pointed out that the proposed clause said nothing about "unusual" cases and said that the Company allocated to itself the complete and unilateral right to decide.

10. Checkoff and other union security

The last item on the Union's initial proposals was, "10. Checkoff of union dues." At the first conference Weiss, going through the Union's initial proposals, said, ". . . on the checkoff, the Company feels . . . that that is a union matter in which it should not become involved and it does involve some expense to the Company to set up another deduction. It would just rather leave the matter of dues to the union member and his union." The Union representatives said nothing.

The checkoff proposal was next mentioned five and one-half months later at the afternoon session of the eighth conference, when Shapiro called attention to it and said that the Union would listen to any kind of proposal the Company might have on any form of union security. Weiss replied that the Company had no proposal. He repeated the arguments made at the first conference and added that the Company did not feel that it should be called upon to exercise compulsion on the union members. Shapiro replied that no compulsion was asked for and that the Union's proposal was for a checkoff that was revocable. Weiss asked how soon it would be revocable. Shapiro said that that was open to discussion and asked what the Company proposed. Weiss said that since the Company did not want to give a checkoff it had nothing to propose as to the term of revocability. He added, "I would be interested in listening to your proposal."

Shapiro asked whether the Company would agree to an agency-shop clause pending legal determination as to its validity. Weiss asked, "... are you demanding that as a condition to reaching an agreement?" Shapiro said, "Yes; I'll offer this instead, rather than a checkoff. You've stated your objections to a checkoff now I said let's have an alternative —" After some back and forth discussion between Shapiro and Weiss, Weston interposed, "We are offering this. We are not demanding it —"

Shapiro returned to the question of checkoff. After bringing out that Respondent did not consider payroll deductions for its Health and Welfare Plan or its profit-sharing plan compulsory, since the employee agreed to them, he asked why an employee could not agree to a checkoff. Weiss replied that he knew of instances where men signed checkoff cards in bars while drunk, or under threat that if they did not sign they would be fired after Section 14 (b) of the Act was repealed. Shapiro said, "In other words, that which you consider to be good for them is not compulsory ..." Weiss asked why a checkoff was needed, when two years before the old contract had been agreed to without it. He asked, "Well, haven't the people paid their dues?" Shapiro replied, "I don't think that is any of your business." Weiss said that as long as the Union demanded a checkoff he was entitled to an answer.

Shapiro asked whether the Respondent would agree to a union-shop clause in the event Section 14 (b) of the Act should be repealed. Weiss replied that he did not think the clause would be repealed, and that in any event the Company had been opposed to compulsory union membership even before there was a right-to-work law. Shapiro asked if the Company had any proposal to make on union security and Weiss said it did not.

The Union's proposed contract submitted on October 18 included a provision for the deduction from employee's wages of dues and initiation fees when authorized by writing, subject to revocation "in accordance with the . . . conditions as appears in the authorization." At the ninth conference, following discussion, the Mediator met with the two groups separately. When they reconvened, he stated that there were wide areas of disagreement between the parties and that the Union had a "feeling of urgency to try to conclude this thing." He asked if the Company and Union would consider making a "wrap-up offer" for final conclusion of the negotiations. Weiss said that some of the clauses involved "very difficult language" and that therefore he did not "see how it would be a wrap-up package." However, he said that the Company would be glad to consider a "wrap-up package" from the Union if the Union wanted to submit one. Shapiro said that the Union was willing to submit one if both parties did, but not unilaterally. Weiss insisted, "I think it would help if the Union would submit a package proposal." Shapiro echoed the statement, substituting "Company" for "Union." Weiss explained to the Mediator that many of the disputed clauses represented language "dearly bought by the Company over a period of years, and the Company is not disposed to give up that dearly bought language lightly." He then said that the Company would be gald to consider "any sort of package deal" the Union might care to submit and said that progress had been made by the Union finally accepting his "proposal and submitting a complete contract proposal. Perhaps progress would be made by the Union [just] spelling out, 'We have got to have this. We have got to have this. We will give in on this.'" Weiss explained that the Company's refusal to submit a package was a "matter of bargaining technique," and that Respondent's best judgment was that it would accomplish nothing. He said, "We would like very much to get this thing wrapped up. It would be helpful if we could hear from the Union their must items, and we would know to some extent where we stood. We invite a statement from the Union as to the items that they absolutely have to have on which they will not retreat at all." Shapiro replied that the Union had already bargained away too much and would not bargain away one thing more without buying something. Weiss said that even if the Company made a concession it would accomplish nothing, because, he said "I sincerely believe that Mr. Shapiro has in mind that unless he gets the checkoff, he's not going to agree to a contract." Shapiro replied that he had offered the Company four different proposals on union security. Weiss then said that he had had union negotiators call him off privately and say, "give us the checkoff and you can write the rest of the clauses." Challenged, he admitted that Shapiro had made no such proposal, but he said, "I would bet a substantial amount of money . . . that one of the must items that Mr. Shapiro told you privately was the checkoff. If he did tell you that checkoff was one of the must items, it's my opinion that the parties are hopelessly deadlocked on the checkoff issue." Weiss again stated that the Company would be gald to hear any package offer the Union might care to propose and that the Company would carefully consider it.

11. The Powderly Visit

At the seventh conference, held on August 4, 1965, Weiss agreed to allow an independent timestudy engineer to visit the plant on behalf of the Union to study two jobs on which grievances had been filed. Downer requested that, in order to enable the Union to negotiate more intelligently about wages, the company also have its industrial engineer meet with the Union's staff industrial engineer and review with him and explain the Company's work standards program, and that in connection with that discussion, ". . . we would like to have the right to come into the plant with this time and motion man and make some study — " Weiss agreed to the request and suggested there not be any more negotiating meetings until the studies had been completed. Downer acquiesced. On August 18 Respondent wrote to the Union that it had been agreed that a union staff engineer would meet with McClain to enable the Union to better understand the Company's incentive plan. About September 15 the Union wrote to Respondent "temporarily waiving" its demand for a spot check of piecework jobs by a union timestudy man and requesting that negotiations be resumed.

On October 11 the eighth bargaining conference was held. Shapiro stated that it had been agreed that the Union's staff engineer timestudy jobs and that the Union would not bring him from Chicago merely to talk to McClain. He said that he wanted a clear understanding of what the engineer would be permitted to do as well as a firm date, preferably, but not necessarily, with McClain present. He said, "We expect him from personal observation and personal study to determine independently what he can about your incentive system, with the assistance of Mr. McClain." Weiss agreed that the staff engineer could come during the following week. On October 14 Shapiro wrote to Respondent stating that Powderly, the director of the Union's Industrial Engineering Department, would be at the plant on October 20 to study the incentive system. His letter closed:

> We anticipate that as per our agreement, the Company's timestudy engineers and records will be available to Mr. Powderly as a necessary preliminary to the actual study of the various jobs throughout the plant.

Powderly spent October 20 and 21 at the plant. On October 20 he spoke with McClain about Respondent's system and then, accompanied by McClain, his assistant, Jemelka, and Neusser, the shop committee chairman, went through the Western plant and timed some of the jobs selected by the Union. In some instances the Company changed operators for purposes of Powderly's timing. He was furnished no written material but was instructed as to the various operations by McClain. In the afternoon they repaired to the office where Powderly made his computations and then was given Respondent's original timestudy sheets for examination and comparison of results. The next day Powderly and Neusser made a similar tour through the Welhausen plant, accompanied this time by McClain and Koening, who was in charge of timestudies for Welhausen. At about 3 o'clock Powderly had to leave to catch his plane and McClain directed Koening to give him the standards on the jobs he had timed without requiring Powderly first to make his own computations. Because of lack of time Powderly did not see the Welhausen timestudy sheets.

There was sharp conflict between Powderly and McClain as to what material Powderly requested before making his timestudies. McClain testified on direct examination that Powderly, before making his timestudies, requested only the standards but on cross-examination said that Powderly had requested the timestudy sheets. He admitted that copies of the job descriptions on the timestudy sheets were on cards in the various departmental foremen's desks but said that he did not offer them or tell Powderly of their availability because he did not know what Powderly was looking for. Powderly first testified that he requested the timestudy sheets and job descriptions and that he was shown nothing at any time. On cross-examination, however, having read his own report on the visit, he admitted having been shown timestudy sheets.

As Powderly's recollection of his visit was inaccurate in various details, his testimony that he specifically asked for the job descriptions cannot be accepted. However, his testimony that he requested the timestudy sheets before making his tour was corroborated by McClain's admission on cross-examination and by the circumstance that job descriptions which are usually included on such sheets are highly important for checking timestudies. It is noted also that Shapiro had made an express written request that the timestudy records be available to Powderly "as a necessary preliminary to the actual study of the various jobs. . ." It is found that Powderly did request Respondent to furnish the timestudy sheets before making his timestudies and that Respondent refused to do so at that time.

McClain testified that he refused to let Powderly see the timestudy sheets in advance because he did not want him to be influenced in his own studies by the computations and standards on the sheets. This explanation has several weaknesses. First, doctored timestudies would hardly serve the purpose of Powderly's visit, namely to gather information about Respondent's system. Second, even assuming, *arguendo,* that the Union wanted, and might have been able, to confuse the negotiations by coming up with "looser" standards, Powderly could have accomplished such a result without the aid of Respondent's studies by rating the speeds he observed any percentage he chose above his true appraisal. Third, if Respondent was concerned with Powderly's being influenced unconsciously by its own timestudies, that would run counter to the basic assumption that an operator's speed can be rated with fair accuracy by a competent timestudy man. Fourth, the old contract provided that a union representative was to have "access to the industrial engineer's records on matters concerning the standard-hour system.” The Trial Examiner is convinced that Respondent’s sudden concern about disclosing the standards to Powderly in advance was not in good faith but was a pretext for refusing to permit him to make an adequate check in the limited time he had. Contrary to the assertion in Respondent’s brief, Powderly did not admit that his findings probably would have been influenced by the findings of another timestudy man.[26] what he testified was, ‘You don’t make timestudies based on what somebody else is doing. You don’t do that.” He explained that the reason he needed the studies was to ensure that “. . . the conditions under which the job was performed should be identical. It should be the same type of leather you are working on as the other job. In the breakdown of the elements you ought to have this spelled out so that you can make your elemental timestudy the same as what he had made.” He also testified that the function of his department was not to make its own timestudies but to check timestudies made by employers.

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[26] The transcript on page 402 quotes Powderly as saying, “If there was a difference it would have been influenced by something that the other timestudy man had done.” The context makes plain that an interrogation point belonged at the end of the sentence. Powderly, who was perplexed at counsel’s suggestion, was merely repeating the latter’s question to make sure that he had heard aright. When counsel answered “Yes” to Powderly’s question, Powderly asked, “What’s the something; I don’t follow.” The statement in Respondent’s brief that Shapiro admitted that Powderly’s studies might have been influenced by knowledge of the prior findings is based upon a misreading of the evidence. Shapiro was testifying not about Powderly but about Rolon, who did not use a stop watch and who, therefore, took pains not to see Respondent’s standards in advance. Rolon found Respondent’s standards too low. Powderly testified that Rolon’s system was unsuited to Tex-Tan’s operations.

What Powderly needed in order to get most value out of his work at the plant was the recorded job descriptions, which Respondent refused to give in advance. As a timestudy engineer, McClain was fully aware of the importance to Powderly of the job descriptions with their listing of the elements timed. His testimony that he did not make the job description cards in the various departments available because he did not know what Powderly was looking for is not credited. Powderly did ask for the timestudies, which contained the job descriptions. Even assuming that the oral instructions which McClain and Koening gave Powderly were as complete as those on the job description cards and the timestudy sheets, it is plain that Powderly's task would have been less difficult if he had had the written descriptions before him. Moreover Koening's testimony establishes that the oral descriptions which he gave Powderly were, as would be expected, less full and less precise than the listing of the elements on the job description cards and timestudy sheets.

Powderly testified that he had been unable to draw any concrete conclusions from his work at the Tex-Tan plant since he had had to time the operations without having the benefit of the job descriptions. Plainly the written descriptions of the individual elements would have placed Powderly in a better position to come to grips with the substantial problem arising from the fact that Respondent's timestudies often omitted record of the layout of material when the studies were made and that, as Schaefer's testimony and Manning's admission at one of the bargaining sessions established, the layout was not always static. It found that Respondent's failure to furnish the written job descriptions to Powderly in timely fashion, namely, in advance of his timestudies, was not in good faith and was calculated to impede the Union in its negotiations concerning piecework rates. It is further found that Respondent thereby violated Section 8 (a) (5) of the Act. See *Alba-Waldensian, Inc.*, 167 NLRB No. 101. As Powderly did not testify that he needed Respondent's standards for the various elements to do his work, no finding is made that the refusal to furnish the studies in their entirety was violative of the Act.

C. *The Strike*

On about October 18 or 19 the Union held a meeting to which all Respondent's employees were invited. Shapiro presided. The employees were addressed by several union officials, including Shapiro. Shapiro testified that he informed the employees that the meeting had been called for the purpose of reporting on the contract negotiations; that the Company at no time had attempted to bargain in good faith or even pretend to do "anything but bargaining on the surface"; that in his opinion the Company had not fulfilled its legal obligation to bargain; and that the bargaining committee had met and recommended that the employees "strike against the Company's refusal to bargain," which recommendation Shapiro was presenting to the meeting. Shapiro testified, further, that when an employee asked, "are we striking because the Company has not agreed to a wage increase?" he replied, "no, we are striking because the Company has refused to negotiate on wages and all the other items which has been reported to you . . . ." He testified that he also said that the strike was recommended on the basis of the Company's failure to bargain in good faith about wages, holidays, seniority, and other issues, and not because of the Company's refusal to grant a wage increase or other specific demands. He said that another employee asked, ". . . how much will we get if we win the strike?" and that he replied that they were not striking to get anything except to get the Company to bargain in good faith. He said there was also discussion about the possible length of the strike and strike benefits. He testified, further, that he said, "I call for the following motion: To authorize the negotiating committee to call a strike against the Company's refusal to bargain in good faith at such time as they consider it necessary"; and that an employee rose and said, "I make the motion that we accept the recommendation of the negotiating committee to authorize them to call a strike.'' The motion was passed with few dissenting votes.

On November 4 or 5 a meeting of 60 to 70 employees active in the Union, including representatives from each department, was held at the union office. Shapiro testified that he stated at the meeting that many workers would raise questions with those present as to what the Union's demands were and that it was the obligation of everybody at the meeting to make it clear to employees when those questions were asked that "We were not striking for any specific demands, that we were striking only because of the Company's refusal to bargain in good faith with the Union." He testified: "I said I wanted to impress this upon them, because this might become an important issue in the future. I told them, further, that we had filed a charge with the National Labor Relations Board alleging that the Company had refused to bargain with the Union in good faith . . . and that we had to be very careful in all of our discussions with workers, and elsewhere, to make this point, that the purpose of the strike was against the Company's unfair labor practices, their refusal to bargain in good faith. I repeated this several times; so did other members of the negotiating committee; so did speakers from the floor." A motion was passed to declare the Companies on strike as of midnight, November 7. The strike did take place at midnight November 7, and picket lines were set up shortly thereafter.

D. *The Negotiations During the Strike*

On December 3, 1965, on call by the Mediator, the parties met for the 10th bargaining conference, the first since the inception of the strike. Shapiro asked whether there was anything in the current union proposals for changes in the old contract, many of its proposals having been withdrawn or modified, to which Respondent would agree. Weiss replied that Respondent had already embodied many in its own proposed contract. Shapiro challenged Weiss to point to any, other than the inclusion of Imperial Leather in the recognition clause, and Weiss enumerated certain articles and section numbers. He refused to describe the alleged changes, arguing, "The contracts speak for themselves." A comparison of the two contracts, General Counsel's Exhibit 3 and Respondent's Exhibit 10, shows the following with respect to the clauses designated by Weiss: Article II (Recognition) was changed to include Imperial Leather; Article III, Section 7, was the new section on retiming, already described, starting out, "Without in any way limiting the Company's authority set forth herein and purely by way of explanation . . ."; Article III Section 8, was a new section reducing the wages of some probationary employees which had been proposed by Respondent but never accepted by the Union; Article VI (Vacations) had no changes; Article XI (Seniority) Section 8, allowing some employees being laid off to apply for vacant jobs in other departments, was changed so as to cover employees with 3 years' seniority instead of 5 years' seniority as provided in the old contract; Article XI Section 9, allowing employees to retain their seniority when transferred to another department for the convenience of the Company, was a new provision; Article XIII (Profit Sharing Trust) changed the words, "revised profit-sharing trust agreement of 1961," in Article XIV of the old contract to, "its profit sharing trust agreement now in effect".; Article XIII of the old contract (Pension and Retirement Plan) had been eliminated as obsolete at the start of the negotiations by mutual consent since the plan had been merged into the profit-sharing trust.[27]

Weiss announced that the Company would eventually submit a proposal for a wage increase notwithstanding its strong bargaining position after successfully withstanding the strike, and notwithstanding that, on the basis of the employees' increase in real take-home pay, it could justify a refusal to grant any wage increase at all. He said, however, that purely as a matter of "bargaining technique" it would not make such a proposal until the issues round the seniority clause, the grievance clause, the arbitration clause, "the matter of protecting the Company's standard hour system," and the management clause were resolved.

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[27] Weiss did not specify which Article XIII he was designating as embodying a change proposed by the Union.

Shapiro said that he had a new proposal to make on arbitration. Before he could make it Weiss suggested a provision that if the parties failed to agree within 60 days on a third arbitrator or on settlement of a grievance, the Union for a period of 20 days after such 60-day period have the right to strike on the issue of the single grievance. Shapiro said that the Union would consider that proposal insofar as the arbitration procedure was concerned. He started to make the Union's new proposal but Weiss insisted upon interrupting with the reading of a quotation from a law review article on arbitration written by a Board attorney. Earlier Weiss had read an extended legal note describing another law review article on arbitrators by Circuit Judge Hayes. Shapiro finally made the Union's proposal, which was that in the event of an impasse as to the selection of the third arbitrator, he be selected by the parties from a panel submitted by the Commissioner of Labor and Statistics of the State of Texas. Weiss said that Respondent would check on the Commissioner and give an answer at the next meeting. Apparently the proposal was rejected. The issue of retiming of jobs and of ventilation evoked from Weiss responses of a nature similar to those given before the strike. As to retiming he cited Section 7 of Article III of the Company's July 28 contract proposal, beginning, "Without in any way limiting the Company's authority set forth herein and purely by way of explanation," and again refused clarification, stating some half-dozen times that the language meant exactly what it said. As to ventilation Weiss said that there was no problem and that under the Union's proposal it might demand air-conditioning and when the Union offered to exclude air-conditioning expressly, he counterproposed, "Say that the Company will provide the same adequate heating and ventilation system that it has in the past," a proposal which the Union rejected.

The parties arranged to have their next bargaining session on January 25, 1966. On January 24, however, Downer and Twedell met with Weiss and Brockermeyer in Weiss' office, with the Mediator present. The employee committee were not informed. Downer testified: "Mr. Weiss brought it up that 'This is an off-the-record meeting . . . no committees are present . . . It is an effort to see if we can get together and resolve the issues, and it is not to be used as public knowledge or information at any time anywhere." He also testified that he himself made a statement to the same effect.

Downer told Weiss that the strike, pending charges, "and everything" could be got rid of by the Union accepting the Company's July 28 contract proposal with the following changes: a provision for the appointment of a third arbitrator and deletion of the substantial evidence section from the arbitration article; checkoff; return to work of the strikers; clause for leave of absence for union business; four paid holidays or, at the Company's option, an equivalent wage increase; a 10-cents-per-hour increase each year for three years. Weiss suggested as an alternative to the checkoff that the Company provide a table on payday where a union representative could collect dues. The Union representatives rejected the proposal but said they would accept a revocable checkoff. Weiss told them that the checkoff would be the "fly in the ointment" to a settlement. He said that he would communicate with the Company executives and let the Union know their position through the Mediator before the bargaining session scheduled for the next day. He requested that Downer be responsible for the negotiations because, he said, there had been difficulty between him and Shapiro. The reply given was, "Subject to you saying this will be an area in which we can work it out , . . we would see to it that Downer came there with the authority to settle, based on that." The next morning Downer was told by Kincaid that Respondent had rejected all the Union's proposals and he left.

At the start of the 11th bargaining conference Weiss said: "Downer, where is he? I don't see him here this morning . . . . I met with him yesterday. He said he would be here. He was in town this morning, I understand. I hoped that he would be here. We seemed to be making some progress when we met yesterday." He then handed Shapiro a proposed schedule of new wage rates for the various unit jobs,[29] stating, "This is the

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[29] General Counsel's Exhibits 15 and 16, for Western and Welhausen respectively.

Company's counter-proposal to the proposal made yesterday by Mr. Twedell and Mr. Downer . . ." Shapiro asked whether Weiss had any proposals on other matters as to which the Union had made proposals. Shapiro went through them and as to each was told that there were none. When he asked about seniority, Weiss replied: ". . . I thought we agreed on that yesterday . . . . I mean the representatives of the Union with whom we met yesterday accepted the Company's seniority proposal. That's no longer an issue. At least that was our impression when we came here today. Now, if they are reneging on it, that's something else." Shapiro replied that the only persons authorized to negotiate a contract were the committee and that any agreement reached would have to be with them. Weiss said, "I understand that you . . . [tell] me, then, that we just wasted our time in meeting with some high officials of the Union. I am sorry that you put the Company to the expense involved in negotiating with somebody that you now say had no authority to negotiate . . . . I think that's bad faith." The Mediator interposed that he had called a meeting in the hope of laying groundwork for reaching an understanding at the January 25 bargaining conference; that it was to be "off the record" and "exploratory," and "came to no avail"; that so far as he was concerned the meeting was "dead"; that the only thing done had been that the parties had "explored certain areas of settlement and did not reach an understanding"; and that he had requested the parties to forget the meeting. He expressed disapproval of continued reference to the meeting. Weiss said: "We did not reach an agreement on the contract, but we did receive a proposal which we thought was a proposal from the Union which the Company has spent a great deal of time considering. I mean I spent most of the day yesterday. I called my clients and they spent yesterday afternoon. We got down here early this morning considering this union proposal which we were prepared to make an answer to this morning, which I understand — now understand that the union proposal made yesterday has been withdrawn. Is that correct . . . ." Shapiro replied: "I don't know what proposal was made yesterday. . . . All I care about is what you and Mr. Kincaid agreed to that there was no agreement of any kind reached yesterday, so our entire proposal is on the table and that's what we have to talk about here, which includes seniority and everything else." Respondent at no time denied that it had rejected all of the modifications of the Company contract in the Union's "package."

Shapiro said that the Union would look over Respondent's wage proposal. At the third executive meeting Weiss, with Shapiro absent, stated what he claimed was the average increase proposed for each department, giving figures ranging up to 6.8 cents per hour, and he said that with the addition of a two percent supplemental increase, which Respondent offered that day, its proposal approached the Union's demand of 10-cents per hour. The record does not show how Weiss' figures were computed. Fineglass testified that Weiss said that the employees' productivity could be improved so that they could "make out." Shapiro objected later that under the January 25 proposal a large number of time workers were given no increase; that the new rates included some direct cuts in pay, especially, but not exclusively, in the case of time rates for piecework jobs, all of which were to be 5 cent less per hour than the base rates for the same jobs; and that a substantial number of employees had not been making standard and thus might not receive any increase at all. He also said that, disregarding the foregoing and assuming no change by the Company in existing standards, the increases at Western amounted to an average of at most 4½ cents per hour. He said that he did not have sufficient data to analyse the Welhausen rates. Shapiro explained on the witness stand the method he used in making his computations.

At the second, third, fourth and fifth executive meetings several proposals and counterproposals were made by both sides with respect to various issues, especially wage rates. At the fourth executive meeting the Union injected the question of the impact of the then pending amendments of the Fair Labor Standards Act. Weiss proposed that if the statutory minimum was increased, Respondent have the privilege of adjusting rates upwards at its discretion. Shapiro objected that that was inconsistent with the Union's duty to bargain. The Union proposed that the current spread in Respondent's wage rates, amounting, the Union said, to about 25-cents per hour, be maintained. Weiss countered with the proposal for a minimum spread of 15 cents, with the Company having the right to make further adjustments upwards. Shapiro requested that the Company put its amended proposal as to wage rates in writing, which Weiss did by the draft of a proposed amendment or Article III of the contract.[29] At the fifth executive meeting Weiss asked if the Union would consent to placing the Company's proposal into effect, bargaining to continue on all matters, including wages. The Union refused to agree. It proposed that it would terminate the strike if all strikers were immediately reinstated to their former jobs. Weiss replied that the question of the return of strikers was premature until agreement was reached or the strike called off. The Union withdrew the proposal. Weiss proposed that the contract embodying Respondent's proposed wage rates have a 3-year term, with the Union having the right to one reopening as to wages on or after November 8, 1967, by notice on or before October 8, 1967, and to be allowed to strike on 10 days' notice in January 1968.[30] Shapiro refused, saying that the busy season ended at Christmas time and that a right to strike in January was an empty one.

E. *The Negotiations After the Strike*

On June 6, 1966, the Union sent Respondent a telegram declaring that the strike had been terminated. The 12th bargaining conference took place four days later. Shapiro was accompanied by Weldon and a committee. After discussion of matters relating to the recall of the strikers and their vacation pay, Shapiro brought up for negotiation the Union's various proposals as to Respondent's piecework system. Except for the question of grievances on the establishment of standards, these had been omitted from the proposals made by the Union at the five executive meetings during the strike. Weiss protested that those matters were no longer issues, since the Company's proposed contract clauses on those subjects had been agreed to by the Union. He accused the Union of not being interested in reaching an agreement. Shapiro answered that nothing had been settled.

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[29] General Counsel's Exhibit 21.

[30] General Counsel's Exhibit 22.

When Shapiro came to the filing of grievances on the establishment of rates, Weiss said, "we are willing to consider the inclusion among the items to be grieved about any subject matter including that, provided it can be worded in such a way that it will not enable the Union to run the —" Shapiro interrupted and said that Weiss should word it. Weiss suggested that Weldon draft a clause and Weldon said that he would try but Shapiro vetoed that, saying, "Mr. Weldon has not gone through the ordeal of trying this time after time after time with you, and . . . have you sit back in that chair and say, 'well, we considered it, and we don't like it and have you got something else to submit?' " Tolbert interposed an argument not previously made by Respondent, namely, that under the union proposal the standard would not be established while a grievance on it was pending and Weiss said that he so interpreted the union proposal. Shapiro said that that was untrue and proposed that the contract clarify the matter by providing that during the pendency of a grievance on the establishment of a piece work standard the standard go into effect pending the outcome of the grievance. Weiss reverted to his former position that under the proposal the Union could file a grievance over every standard.

At the 13th conference Shapiro proposed that the contract provide the following, which he told Weiss Weldon had devised:

> . . . The Company shall have the right . . . to establish and put into effect work standards on all jobs after study by their time study engineers . . . . The employee may at any time after a 2-week trial period at this standard, if dissatisfied with the standard, submit a grievance thereon . . . . The Company will thereupon recheck the operation . . . to determine the accuracy of the standard. . . . If there is . . . no change recommended . . . by the Company . . . . the department steward . . . chief steward, and the aggrieved worker shall meet with the Company's timestudy engineer and the department foreman . . in an attempt to resolve the issue. If the issue is still not resolved at this stage, it shall proceed through formal process of grievance procedure.

Weiss said that the proposal would be considered and an answer given at the next meeting.

At the 12th and 13th conferences Weiss repeated the Company's offer to place the increased wage rates into effect without prejudice to the Union's right to bargain for further increases. At the 12th conference Shapiro refused to agree, saying that the Union did not consider them as providing for meaningful increases but at the 13th conference he said that the employees were to vote on the proposal the following Saturday. He made a proposal modifying Respondent's wage offer which he said he would recommend to the employees if the Company accepted it, so that the issue of wage rates would be disposed of. Weiss said that it would be considered by the Company. Shapiro asked about the possibility of paid holidays. Weiss replied that if the Union made a proposal agreeing to accept the Company's contract proposal *in toto*, with one or two paid holidays, with the Union accepting the company proposals on management rights, the grievance clause, arbitration clause, and would drop the demand for a checkoff, the Company would consider it. Shapiro replied that if the Company wanted to make a proposal in that form the Union "would very seriously consider it." Weiss asked, "Are you saying that the two paid holidays is all that stand between you agreeing to the Company's proposal?" Shapiro said it was three paid holidays and the Union's modification of the Company's wage proposal. Weiss questioned whether that would wrap up the contract negotiations and invited Shapiro to make the proposal. Shapiro replied, "You know this is the kind of a trap that you can only catch a guy in once . . . . You want me to negotiate with myself, or with the Committee . . . Every time you come back to us and say well, cut this out and cut that out and then maybe we'll consider it. All we find out we do is cut out more and you have considered nothing." Shapiro offered to take the committee out and have an answer in 15 minutes, and he said that if the committee recommended it, it would be approved by the employees. Weiss said, "We have no new proposal to make on fringe benefits at this time." Shapiro appealed directly to Manning and Tolbert, saying that it seemed that there was a possibility of reaching agreement and "washing out'' all negotiations, and he begged them to make a proposal along the lines indicated by Weiss, promising an answer in a few minutes. Weiss suggested that Shapiro write a new contract embodying as much of the company proposal as the Union saw fit. Shapiro refused, accusing Weiss of trying to get the Union to take more issues out of the negotiations. Weiss pointed out that Shapiro was now negotiating on all the issues that had been "okayed" and waived at the executive meetings. Shapiro turned to Tolbert and Manning and said, "I've indicated to you, Mr. Tolbert, and to you, Mr. Manning, how we can reach an agreement . . . . I said that if the Company would submit a proposal which would include the wage proposal that I made this morning . . . [p]lus the three paid holidays, we would give it very serious consideration, wiping out all the other issues in the contract." Weiss declined to make a proposal for holidays unless he could be sure of a contract the Company wanted. Shapiro asked if that meant that the Company would offer three paid holidays. Weiss said that the Company would make no proposals for fringe benefits until it got ". . . a definite proposal from the Union on these main issues which have blocked the negotiations . . . all this time."

At the 14th conference, some 2 months later, the Fair Labor Standards Act amendments having been passed by Congress, Respondent presented a new proposal as to wage rates, to be effective February 1,

1967. Weiss stated that the proposal was in lieu of the previous wage proposal submitted, including the 2 percent ~~supplemental~~ increase, and that it provided for no change in the old wage rates until February 1, 1967. Weiss also said, however, ". . . If you told me . . . that the company proposal as previously submitted is satisfactory and you'll accept it and sign a contract with these new rates, if the Company will put into effect its previous proposal during the 4 months period that intervened, the Company would take a long, hard look at it and we might have a deal." Shapiro asked Weiss whether, if the rest of the contract was satisfactory, the Company would still seriously consider paying for several holidays. Weiss replied that he did not recall having indicated any such position but that in any event in view of the increase in the minimum wage and the proposal which the Company had made that day, the addition of the increased labor cost of any paid holidays would be ruled out. The union representatives then caucused with the Mediator, who returned later without Shapiro and made a report to Weiss which was included in the tape recording.[31]

At the last conference, the 15th, Weiss presented a new contract proposal.[32] It included the following new section in Article III:

> Section 12. Existing piece-work standards are recognized as established. The Company

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[31] The minutes, Charging Party's Exhibit 9(G), show statements by Shapiro after the caucus. However, the minutes of meeting number 15 make plain that this is an error.

[32] General Counsel's Exhibit 32.

> has the right to establish and put into effect new or modified piece-work standards. As to new or materially modified piece-work standards, an employee who sincerely believes that there is some error or inaccuracy in the standard, and he has actually worked on the standard in question for not less than eighty (80) hours, may call his contention to the attention of his foreman. The Company will then re-check the operation and the standard. A report on such re-checking will be made to the employee who raised the question. If the employee wishes, he may request the re-checking through the Union, in which event, the report on the re-checking shall be made to the union steward in the department involved.

Weiss also submitted a schedule of rates embodying the Company's January 25 proposal as augmented by the 2 percent, or 3 cents per hour when rounded out.[33] The contract provided that after its execution the January 25 wage proposal as augmented by the 2 percent would be placed into effect; that from February 1, 1967, to February 1, 1968, the wage schedule submitted at the September 23 meeting would take effect; and that on February 1, 1968, in lieu of any fringe benefits in addition to those already in effect, the Company would add 20 cents per hour to all rates. After caucusing the union representative returned and Shapiro pointed out that the old provision for premium pay for daily and Saturday overtime had been removed from the contract. Weiss explained that the Union had been insisting upon maintaining the existing spread of rates when the Federal minimum would be increased 20 cents per hour on February 1, 1968, and that in order to reach agreement with the Union the Company had consented to a 20-cent "across-the-board" increase at that time but had to skimp somewhere else in order to be able to meet the Union's demand.

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[33] General Counsel's Exhibits 33 and 34.

Shapiro stated "for the record" that the Union accepted the Company's wage proposal of January 25, as amended by the 2 percent extra, which proposal included the understanding that negotiations on the rest of the contract would continue. Weiss said that that would be taken under consideration and that he did not know what the Company would do. He protested that he had been given to understand that the wage question for the period after February 1, 1967, would be resolved if the Company placed the old proposed increase into effect up to that time. Shapiro said, "You have not said today that you would do that." Weiss said, "No; we're talking about whether you agreed to the Company's wage proposal." Shapiro said, "I'm talking about whether or not you agree. How could I agree if you don't agree." Shapiro pointed out, also, that the February 1, 1967, proposed increase amounted to only 12 cents rather than the 15 cents by which the Federal minimum wage was to be increased since it had been computed on the basis of rates which did not include the extra 2 percent which had been offered.

Weiss said that the Company had given a great deal of thought to the checkoff since it realized that it was the only issue involved. Shapiro retorted that that was a lie.

After a luncheon recess Weiss made a proposal as to the February 1, 1968, rates and Saturday and daily overtime which Shapiro rejected. Weiss asked if the Union would accept the company contract, with Saturday and daily overtime restored, but without paid holidays or the checkoff. Shapiro asked whether Respondent would grant three paid holidays if the Union dropped its demand for checkoff and for the 2 percent extra after February 1, 1967. Weiss refused and Shapiro said, "We don't have an agreement." The Mediator said, ". . . what you are really apart on is these three paid holidays." This colloquy ensued:

> Mr. Weiss: He said we still don't have a contract until we give him the checkoff. Now, the paid holidays —
>
> Mr. Shapiro: I did not say that.
>
> Mr. Weiss: No, you didn't say it, but that is what you meant.
>
> Mr. Shapiro: No, it isn't . . . you didn't listen to me . . .
>
> Mr. Weiss: No — No, I listened to you very carefully and I understand what you are saying.

Mr. Shapiro: You can't understand what I am saying if you say that I made the check-off —

Mr. Weiss: We have covered the matter of the holidays —

Mr. Shapiro: There is no use talking to the guy.

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Mr. Weiss: Yes; we have covered the matter of the holidays in section — section 4 of article —

Mr. Shapiro: You didn't hear what I said.

Mr. Weiss: — section 4 of article . . . [III]. We have agreed to maintain the differentials to grant a 20 . . . [cent] across the board increase in February of 1968, and we have done that in lieu of fringe benefits which includes paid holidays. So it is perfectly clear what the deadlock is about.

After extended discussion among Weiss, Shapiro and the Mediator Shapiro said, "Well, if you will listen to me I will tell you. If we were to drop our demand for this two percent and our demand for checkoff, will you agree to the three paid holidays? . . . And I said further that if you want a contract, you have got one." Weiss said, "We have gone as far as we think it advisable in spending money on wage costs . . ." The Mediator again said, "What you are really apart on at this point is the three paid holidays." Weiss replied, "I don't think that is true. I think if we agree to this proposal he would find some way to wiggle out of it because he did not get the checkoff." Shapiro challenged, "Why don't you try it. . . . Why don't you test me and let's see if I mean it or not." Weiss replied, "Well, you would wiggle out of it some way." Shapiro suggested that in view of Weiss' statement about the additional costs that paid holidays would entail, they explore the possibility of finding a formula whereby that would not constitute an increased cost. Weiss insisted that the matter was already covered in section 4 of article III of the proposed contract, and Tolbert said that the Company felt that wage increases were appreciated more by the employees than holidays. Shapiro said, "Well, I guess we have gone as far as we can go."

About 2 or 3 weeks before the hearing one of Weiss' legal associates, Frank Manitzas, telephoned Weldon and asked him about the possibility of settling this case, saying that he had "almost *carte blanche* authority" to negotiate with Weldon. Weldon said that he was interested and both agreed that settlement of the case would involve settling the contract also. After consulting Shapiro Weldon informed Manitzas of the several items which the Union wanted, including, among other things, checkoff and an arbitration article which provided for selection of an impartial third arbitrator and for deletion of the substantial-evidence rule. Manitzas subsequently informed Weldon that some of the Union's proposals were acceptable but some, among them the arbitration and checkoff proposals, were not.

Starting on the day the hearing opened Weiss and Weldon had numerous discussions with a view to settling the case. Weiss proposed to Weldon that there be an early decertification election and that if the Union won, the Company would grant its last wage proposal and a fully revocable checkoff. Weldon, after consulting Shapiro, rejected the decertification proposal but agreed to the rest and Weiss reported that the Company was agreeable. They proceeded to work out the details of the wage proposal. Weiss said that the Union could choose between a 15-cent increase on February 1, 1968, with Saturday and daily overtime at premium rates, and a 20-cent increase without that overtime. The Union chose the 15 cents, but Weiss then informed Weldon that when he consulted his principals they insisted on elimination of the premium pay for Saturday and daily overtime. After some delay Weiss informed Weldon that the Company would not agree, remarking that his client had strong notions about the checkoff. Weldon said, "suppose I can talk my client into substituting for the checkoff a good arbitration clause," which he explained to Weiss would be one providing for a method of selecting a neutral arbitrator and elimination of the substantial-evidence rule. Weiss rejected the proposal.

F. *Concluding Findings as to the Refusal to Bargain*

1. Unit and majority

As admitted in Respondent's Answer, it is found that all production and maintenance employees at Tex-Tan's Yoakum, Texas, plant, regular and extra truck-drivers, shipping and receiving employees, and lead-men, but excluding office-clerical employees, confidential employees, watchmen, guards and supervisors, as defined in the Act, constitute a unit aprpopriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. As Imperial Saddle is an integral part of the unit, it is unnecessary that it be mentioned in the unit description.

The Union has been certified as exclusive bargaining agent of the employees in the unit, no proof has been adduced that it no longer is the designated or selected representative of a majority of said employees, and Respondent has recognized the Union as such exclusive bargaining representative. It is found that at all times material Union has been, and it now is the exclusive bargaining representative of the employees in the appropriate unit. The filing of the decertification petition in Case Number 23-RD-148 on June 4, 1966, is not material. Distinguish *N.L.R.B.* v. *Minute Maid Corporation,* 283 F. 2d 705 (C.A. 5), denying enforcement of 124 NLRB 355.

2. The refusal to bargain about piece rates

Base rates were not guaranteed to pieceworkers; the only guarantee they had was provided by the Fair Labor Standards Act. Consequently a contract fixing only base rates for piecework would not fix piecework wages in any real sense. An employee working on a job with a base rate of $2 per hour would be paid 2 cents per piece if Tex-Tan decided to make the standard on that job one hour, but only 1 cent if it "engineered" the standard at half an hour. There is no issue here of Tex-Tan's being required to negotiate each standard before placing it into effect; at all times that was waived by the Union. The issues as to piecework raised by the Union bearing on Tex-Tan's duty to bargain collectively were the employees' right to bargain collectively for a definition or guiding principle governing standards to be incorporated in the contract, and their right to file grievances over the establishment of standards.

Section 1 of Article III of the old contract, providing, "Wages in the Company's production departments shall be those achieved under the Company's established standard hour piece-work system, . . ." was never in dispute. While the parties assumed that the company booklet was not incorporated by reference into the contract, there never was any doubt that the "Company's established standard hour piece-work system" referred to in Section 1 was the plan described in the booklet. In describing "productivity speed rating" the booklet states, among other things, "An operator working at normal speed is rated 100 percent"; and it also states, "100 percent productivity is attained without specal effort if the operator is experienced on the operation and is applying himself normally." Weiss said, "The system is that a normal man working at a normal speed achieves 100 percent." It must be inferred that the foregoing was the principle or definition intended by Section 1 of Article III and that as to that both parties were in agreement.

The booklet language proposed by the Union is sufficiently definite for purposes of a collective contract. The head of Tex-Tan's Industrial Engineering Department testified that a competent timestudy engineer would be able to determine what normal application is; and notwithstanding the pitfalls that are warned against, timestudy literature generally accepts the proposition that a competent timestudy engineer can determine "normal pace" or "normal effort," or "normal application" with a reasonable degree of accuracy. Employers do commonly manage to live even with the more difficult contractual clauses defining the result of incentive effort, such as those originally proposed by the Union,[34] although there is considerable variation in the particular percentages agreed to for the result of incentive effort,[35] depending, especially, on the kind of operation involved. It is true that the formulation of such a definition or principle presents difficulty and usually results in contractual provisions which are somewhat nebulous and thus not completely satisfactory as to form. However, that is a necessary concomitant of an incentive plan like Tex-Tan's and is the price it has to pay for the exceptional privilege it requires of obtaining the employees' services without first bargaining out their rates of pay with their statutory bargaining representative. Tex-Tan did not suggest any variation or supplement of the booklet language by way of clarification for purposes of the contract. It simply refused to include in the written contract its agreement with the Union as to productivity speed rating. Respondent thereby violated Section 8(a)(5) of the Act. See *Henry I. Siegel Co., Inc., supra.*

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[34] See Mazur, *Smoothing out the Bumps in an Incentive Plan*, in *Job Evaluation and Wage Incentives* 192, Conover-Mast Publications, Inc. (Harrington ed. 1949); see, also, *Henry I. Siegel Co., Inc.*, 147 NLRB 594.

[35] See Mundel, *Motion and Timestudy*, 3rd edition 1960, Prentice Hall, Inc., page 338.

When the Union's proposal was for clauses defining productivity speed ratings in terms of 130 percent or 125 percent being attained with incentive effort, as to which the parties were not in agreement, Tex-Tan's refusal to make any attempt to reach agreement on the subject was equally violative of the Act. The fact that standards are "engineered" does not guarantee their correctness, since they are based upon an evaluation of pace which is subjective. Nevertheless, Tex-Tan adamantly insisted that the Union concede to it for the life of the contract the authority to fix the wages of the piecework employees without collective bargaining. It failed to counterpropose any alternative definition or guiding principle, or to make any effort at all to reach agreement with the Union on such ~~a~~ definition or guiding principle, but insisted on an agreement that there be no such agreement. Its insistence extended to a refusal to negotiate hourly wage rates for the various classifications of employees until the Union dropped its demand for such a provision. Moreover, it insisted with equal adamance upon the right to revise standards without contractual limitation. See *Alba-Waldensian, Inc.*, 167 NLRB No. 101. While an employer may in some circumstances insist upon a clause removing various terms and conditions of employment from the ambit of collective bargaining for the duration of a contract, see *N. L. R. B.* v. *American National Insurance Co.*, 343 U.S. 395, that principle cannot be applied to so large and basic an aspect of the employment relationship as were the wages of the bulk of Tex-Tan's employees. See *Majure Transport So.* v. *N. L.R.B.*, 198 F. 2d 735, enf'g 95 NLRB 311. Tex-Tan was obliged to bargain about, and to incorporate into a contract, if agreement was reached, a definition or guiding principle on the basis of which it would be possible to reach a sound decision as to whether a particular standard was or was not in accordance with the terms of the contract. Even a provision for filing grievances about the establishment of standards would not, standing alone, have afforded the employees their right to bargain collectively about rates of pay. First, Tex-Tan's timestudies did not record sufficient information about the obtaining and layout of materials, so that they would not afford an adequately definite base upon which to compute and settle a disputed standard. Second, a grievance under a contract opens up only the question of whether the contract has been violated.[36]

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[36] Distinguish the earlier *Tex-Tan* case, *supra*, which concerned the setting of standards unilaterally, but subject to grievance, in the absence of a contract. See 134 NLRB 253, 270.

So far as the Act is concerned Tex-Tan, if acting in good faith, could have sought agreement to a definition under which "normal" effort by an average employee would accomplish less than 100 percent of standard. What it was not permitted to do was to insist upon a contract providing that its piecework employees work at rates of pay not bargained out but set by Tex-Tan unilaterally, uncontrolled by any agreement with the employees' bargaining representative. Such insistence was the negation of the collective bargaining principle and, even apart from the fact that what it refused to incorporate into the contract had been agreed to with the Union, was inconsistent with any good-faith intention of reaching an agreement governing rates of pay. See *Alba-Waldensian, Inc., supra.*

Closely related to the question of the requirement that Tex-Tan bargain for an agreement establishing rates of pay for piecework is that of the entertainment of grievances under the contract on the establishment of standards. On frequent occasions up to the eighth conference Weiss said that problems which the Union said existed round standards could be resolved through the grievance procedure. However, when the Union, in its October 18 proposed contract, sought to assure itself on that score by including a provision that grievances on the establishment as well as the application of standards be permitted, which, the Union explained, would not change past practice in any way, Tex-Tan demurred on the ground that the right to file a grievance on every standard would result in wrecking the system. It finally agreed to try to write something. Almost a year later Tex-Tan submitted an amendment, not to the grievance article but to Article III, providing that an employee could call an error or inaccuracy in a standard to the attention of his foreman, in which event the Company would recheck and make a report. Tex-Tan had all along been rejecting any provision allowing the Union to timestudy jobs on which there were disputes, claiming that it was unnecessary since the right was inherent in the right to file grievances on the application of standards. Plainly, when Tex-Tan, at the ninth conference, stated that it would try to write something, it did not intend to allow the Union to timestudy a job for purposes of ascertaining the correctness of a standard, or to subject it to the grievance procedure. Respondent adhered at all times to its position of insisting that the Union give up the employees' right to file grievances on the establishment of standards.

Congress did not intend that every difference of opinion as to the wage terms of a collective contract culminate in a law suit for wages. So costly and time-consuming a remedy would be meaningless in the normal case, even assuming that such an action based on a collective contract would lie in the particular jurisdiction. Congress provided explicitly in Section 8(d) of the Act that to bargain collectively includes the mutual obligation to confer in good faith with respect to any question arising under the collective agreement — i.e. with respect to grievances. Tex-Tan's insistence that the Union agree to exclude from the grievance procedure[87] so all-pervading and important an aspect of the employment relationship as the rates of pay of the bulk of the employees was to insist that the employees give up one of the most significant parts of what Congress sought to accomplish in enacting Section 8(a) (5). This, also, was to negate the basic principles of collective bargaining and was inconsistent with any good-faith intention on the part of Tex-Tan to reach an agreement with the Union as described in Section 8(d).

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[87] Excluding piece rates from the arbitration provisions of the contract presents different problems and is not here considered.

Tex-Tan's position was such that, except for those benefits that would flow from the mere fact of having a recognized bargaining representative for the term of the contract, the employees would have been better off without a contract, see *"M." System, Inc., etc.*, 129 NLRB 527, 551, since they would then have the unquestioned right, as long as Tex-Tan was obliged to recognize their representative, to file a grievance about every standard which Tex-Tan established or revised, limited only by good faith. See *Tex-Tan, supra.*

It is found that by insisting upon a contract which would grant it the uncontrolled right to fix rates of pay for piecework unilaterally and would deny to the employees their right to file grievances as to rates of pay for piecework Respondent refused to bargain in violation of Section 8(a) (5). See *Majure Transport Co. v. N.L.R.B.*, 198 F. 2d enf'g. 95 NLRB 311; see also *Franklin Hosiery Mills, Inc.*, 83 NLRB 276.

3. Respondent's overall approach to bargaining

From the start of the negotiations Tex-Tan engaged in extended discussions of competition from foreign firms and, especially, American firms which had established factories in Puerto Rico, pointing out that it could cut its cost of operations in half by establishing a plant there. This discussion occurred when wage rates and all "economic" demands were excluded from the negotiations by request of Tex-Tan. Obviously, a person so minded can convey a threat without using words of threat. The Trial Examiner would be blinding himself if he interpreted Tex-Tan's repeated and persistent references to Puerto Rican competition, particularly at times when economic issues were excluded from negotiation, as *bona fide* discussion of issues arising from the negotiations rather than subtle threats by Respondent. Whatever doubt there might have been on this score was dispelled when, in the course of discussing a certain engineer's capability in making timestudies, in the leather goods industry, Shapiro remarked that the man had done work for a competitor of Tex-Tan's and Tex-Tan's response was to ask if that was the firm that had moved to Puerto Rico as so many competitors had done. It is found that in order to undermine the Union and to compel it to yield to Respondent complete unilateral control over rates of pay for piecework, Respondent threatened to move its operation to Puerto Rico.

The key to Tex-Tan's basic policy in the negotiations is found in its announcement at the October 20 conference that it intended eventually to make a proposal for a wage increase but would not do so until it obtained the seniority, grievance, arbitration, and piecework clauses it desired.[88] In 7 months of bargaining Tex-Tan had conceded one minor point to the employees, namely, that employees transferred to another job in another department *for the convenience of the Company* would no longer lose their seniority. It is noteworthy that this concession was not made by Tex-Tan's regular bargainers but was made spontaneously by Shows, who never appeared at a bargaining conference again. Tex-Tan had also proposed to lower from 5 years to 3 years the seniority requirement for an employee being laid off to be permitted to apply for transfer to a vacancy in another department. Employees of 2 or 3 years' seniority were rarely laid off, and since the right granted, as pointed out by Tex-Tan, was only to apply for, not to obtain, the transfer, the change from 5 years to 3 was not one that could be considered of importance. Presumably any employee could apply for a vacancy without the benefit of that provision. Another superficial change was the incorporation of some piecework-booklet language on retiming. This was sweepingly modified, however, by the blanket words, "or some other circumstance or condition," and the whole provision completely nullified by the phrase, "Without in any way limiting the Company's authority set forth herein and purely by way of explanation" etc. The other changes, all proposed by the Company, were either editorial or to the disadvantage of the employees.[89] Respondent had refused to agree to any proposal deviating substantially from the provisions contained in the old contract. It refused to incorporate into a contract matters which were, or which it claimed were, the actual practice, including the Union's right to timestudy a job on which there was a grievance, the Union's right to file grievances on the establishment of standards, and a prohibition against retiming by reason of high earnings alone. At the same time it insisted that the contract provide that the employees surrender their statutory right to bargain collectively about piecerates, subcontracting, plant closing or moving, and other matters. While employers are not required by the Act to make concessions, a position as adamant as Tex-Tan's is rarely maintained by an employer seeking in good faith to reach an agreement with his employees' bargaining representative. See *N.L.R.B.* v. *Denton*, 217 F.

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[88] Tex-Tan also mentioned the management-prerogative clause but that had been incorporated by the Union in its October 18 proposal.

[89] The Trial Examiner has omitted mention of the proposed addition to Article III, Section 5, of the provision that base rates be paid for timework on piecework jobs. The practice had

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always been to pay the base rates and that provision had not been requested by the Union. Tex-Tan withdrew it in its January 25, 1966, wage proposal, which provided that timework on piecework jobs be paid at rates 5 cents per hour lower than the base rates. Tex-Tan intended from the start to do away with the practice of paying base rates for timework on the piecework jobs. It submitted a written proposal to pay "time rates" at the very first conference (Respondent's Exhibit 4) which, so far as appears in the record, the union representatives never noticed. The proposal, which was combined with one for lower wage rates for probationary employees, was immediately withdrawn by Tex-Tan, allegedly for reasons of faulty draftsmanship. At the next conference, along with the clause about probationers, the unnecessary and unrequested provision for payment of base rates was submitted, presumably in order not to draw to the Union's attention at that phase of the negotiation to what Tex-Tan actually had in mind about time rates for piecework jobs. At the 10th conference, when enumerating changes in the old contract, Tex-Tan, like the Trial Examiner, omitted mention of the proposed addition to Article III, Section 5.

2d 567, 570 (C.A. 5), enforcing *Marden Manufacturing Company*, 106 NLRB 1335. See also *N.L.R.B.* v. *Reed & Prince Manufacturing Co.*, 205 F. 2d 131, 134-135 (C.A. 1), enforcing 96 NLRB 850.

. . .

Tex-Tan's withholding of a wage-rate proposal was more than a matter of "bargaining technique"; it represented in fact, its basic policy in the negotiations, namely, to refuse to bargain about a wage increase unless the Union first surrendered the employees' right to bargain about meaningful rates of pay for piecework. On January 24, 1966, when the "package" proposed by the Union to end the strike gave Tex-Tan a sign that it had finally succeeded in forcing the Union seriously to consider giving up that right, it offered an increase in wage rates at the bargaining session the next morning. Tex-Tan's cutting off the opportunity for collective bargaining inherent in a wage increase until the Union yielded on piecerates was not "consistent with the purpose of the National Labor Relations Act," see *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224, and denied to piecework employees their right to bargain collectively about their rates of pay. See *Rhodes-Holland Chevrolet*, 146 NLRB 1304, 1316-1317.

Tex-Tan's basic policy of not recognizing the employees' right to representation in bargaining was manifested also in its issuance, without notice to the Union, of a new book of regulations and a new rule as to participation in Saturday overtime. The management-prerogative clause in the old contract gave Tex-Tan the right to change the rules on condition that one week's advance notice was given to the Union. No notice was given and, in any event, the Trial Examiner finds that the old contract and the management-prerogative clause were not in effect when a new book of rules was issued. This finding is based on the adverse inference drawn from Respondent's failure to prove the date the new rules were issued, a fact peculiarly within its knowledge, and from the fact that the Trial Examiner cannot credit Tolbert and Manning's testimony that they did not know. See *Dyer* v. *MacDougll et al*, 201 F. 2d 265, 269 (C.A. 2). As production managers, they would be aware of such matters; they had been asked the same question during negotiations and the matter came as no surprise at the hearing. Plant rules are a mandatory subject of collective bargaining and therefore may not be changed unilaterally. See *Miller Brewing Company*, 166 NLRB No. 90; see also *National Grinding Wheel Company*, 75 NLRB 905.

So far as Tex-Tan's technique of collective bargaining was concerned, it consisted principally in the avoidance, to the extent possible, of discussion of issues at the bargaining table. One device was to negotiate by writing. Thus, when the Union asked questions about the vacation provisions of the old contract in order to find out if some amendment was appropriate, Tex-Tan immediately and without any opportunity to find out what the problems were, if any, suggested that the Union submit a written proposal and that it would be "considered." Such demands by Tex-Tan for written proposals, with no tentative acceptance or rejection of proposals and little or no discussion, were frequent. At the first conference Tex-Tan went through the old contract article by article to identify those which were acceptable to both parties, which was a useful procedure at that stage of the negotiations. At the fourth conference Tex-Tan repeated the process over a mild objection by the Union that there was a better way to identify the points at issue. At the eighth conference Tex-Tan insisted on repeating the article-by-article procedure again, this time with respect to its July 28 proposed contract, even though it knew that there were no important changes from the old contract. It refused to identify any changes from the old contract to justify the procedure but simply insisted adamantly on a repeat rundown. The parties had been deadlocked for months on important issues such as productivity speed ratings, retiming, grievances on piecework rates, arbitration, ventilation, holidays, vacations and a few others, and Tex-Tan knew what those issues were. During the article-by-article procedure Tex-Tan attempted to start discussion on minor issues. Tex-Tan's purpose in going through the 22 articles individually plainly was to pretend to be bargaining, while actually diverting the discussion away from the issues that it knew had to be resolved. Repeatedly it read lengthy extracts from law review articles. Fruitful negotiation of the real issues was also avoided by the device of not permitting any decisions — even tentative ones — to be made at the bargaining table. See *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F. 2d 229, 231-232 (C.A. 5) enfg. 122 NLRB 168. Tex-Tan's negotiators would say that individual proposals of the Union would have to be reported by them to Company officials for decision, so that the Union had little contact with Tex-Tan's decision-makers — none after the fifth conference except for the appearance of C. C. Welhausen at the second executive session by special request. Manning, Tolbert and Weiss — mostly Weiss — talked; but it was plain to see that, notwithstanding their claim to authority, they did not exercise any. This was particularly true of Tolbert and Manning. They were intrigued by the Union's proposal that the contract spell out what constituted disqualification for Saturday overtime and agreement was actually reached on that at the bargaining table.[40] In order to carry out the fiction that Manning and Tolbert were authorized negotiators Weiss said that he would write such a provision and so wrote in his summary of the conference. He did not do so and Manning and Tolbert never repeated such exercise of bargaining authority. The Trial Examiner finds that Manning and Tolbert did not have authority to bargain.[41] The only other instance of agreement being reached at the bargaining table, namely the Company's agreement that an employee transferred to another department for the Company's convenience not lose his seniority, as already noted, was not made by the Company's regular bargainers.

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[40] Apparently Manning and Tolbert were unaware of Tex-Tan's intention to do away with premium pay for Saturday work, an intention established by its overtime article submitted at the first conference, which omitted the provision for daily and weekend overtime. So far as appears from the record, it escaped the attention of the Union. It was restored, without discussion and without request by the Union, in the proposed contract of July 28, 1965, only to be excluded again in Tex-Tan's proposed contract of September 29, 1966.

[41] An idea of Manning and Tolbert's actual authority in Tex-Tan may be gleaned from an incident peripheral to the bargaining. After the strike the Union, which was permitted to post notices of the time and place of meetings on Company bulletin boards, requested permission to add to the notice for the meeting which would vote on the Company's wage proposal the words, "All are invited." The discussion of that question and of whether the notice, which in any event could not be larger than eight by eleven inches, could be hand-lettered rather than typewritten, took up eleven pages of transcript. Neither Tolbert nor Manning, both in full charge of production for their respective companies, could give the permission; the question had to be submitted to higher authority.

The Union found it impossible to advance negotiations by amending its proposals so as to meet Tex-Tan's objections. Thus, when it proposed that standards not be revised except for substantial changes in job content, Tex-Tan objected that the word "substantial" would lead to difficulty. When the Union dropped "substantial," Tex-Tan objected that there might be a question as to what is a change. When the Union proposed that jobs not be retimed by reason of high earnings alone, Tex-Tan objected that that would prevent the correction of errors. When the Union offered to add that the clause would not preclude retiming where error had been made, Tex-Tan said that it would invite grievances. When Tex-Tan objected that the proposed provision would constitute an admission that jobs had in fact been retimed because of high earnings, the Union proposed to add, "Just as in the past our policy will continue to be that we will not retime a job," etc. Tex-Tan replied that the Union was trying to wreck the piecework system. The Union found that as to these and other issues it was engaging in a labor of futility in trying to meet Tex-Tan's objections. Moreover when Tex-Tan rejected the Union's package proposal to end the strike by giving up all but six of its demands, Tex-Tan repeatedly accused the Union of bad faith in standing by the demands it had offered to drop, conveniently forgetting the "ground rules" Tex-Tan itself had framed for the negotiations. By thus placing the Union on notice that it would refuse to recognize the conditional character of any Union proposal, Tex-Tan excluded from the negotiations the normal give and take of good-faith bargaining so often needed if agreement is to be reached. See *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217.

Arguments advanced by Tex-Tan also betray the absence of good-faith purpose to reach agreement. Bargainers, when pressed, often resort to reasoning which cannot bear scrutiny; obviously that is not necessarily inconsistent with good-faith attempt to reach agreement. However, the incidence of such arguments by Tex-Tan was extremely high, and the description of the negotiations in the evidentiary findings does not by any means reflect their extent. At the 12th conference, after more than a year of bargaining, Tex-Tan for the first time objected that the Union's proposal for grievances on the establishment of standards meant that the standards would not be in effect pending resolution of the grievances. This contention was made notwithstanding the absence of any justification for such an interpretation and notwithstanding that the Union had made clear that it was not intended to change the prevailing practice, but that Tex-Tan was to fix standards initially without consulting the Union. When discussing the Union's proposal that standards be set so that an employee would achieve 130 percent if working "with incentive effort," Tex-Tan argued that the Union's proposal referred to a man working at normal speed. When the Union asked for changes in the arbitration clause, which, because of its terms, had been found useless by the employees, Tex-Tan argued that it was so good that in 2 years there had been only one arbitration — "don't mess with it," was the counsel given; and it argued that the "neutral" arbitrator should be someone who would "have a personal interest" in Tex-Tan's continued operation. When the Union proposed a provision about ventilation, Tex-Tan, having admitted ventilation inadequacies in various parts of the plant, counterproposed a provision, "that the Company will provide the same adequate heat and ventilation system that it has in the past." It answered complaints referring to stifling air and summer temperatures as high as 125 degrees by arguing that doctors say it is good to sweat; that girls in air-conditioned law offices complain that it is too cold; and that a provision about ventilation might result in a decision by an arbitrator requiring air conditioning. Tex-Tan justified this last fear by citing an allegedly foolish award on overtime by an arbitrator appointed through the machinery of the Federal Mediation and Conciliation Service, although Tex-Tan always insisted upon arbitrators it could depend upon. When challenged to point to any of the Union's proposals for changes which Tex-Tan had accepted, Tex-Tan pointed to its own editing, its own meaningless counterproposals, and to its own proposal to reduce the wages of probationary employees. When asserting that its wage-rate proposal approached the Union's demand for a 10-cents-per-hour increase, Tex-Tan said that that figure could be reached with the new rates if the employees improved their productivity. To justify cutting the time rates for piecework jobs to 5 cents less than the base rates, Tex-Tan argued that it was being done in order to discourage timework, a matter completely within its own control. At the first conference Tex-Tan represented that Imperial Saddle, which was merely Division 15 of Western, was a "newly established company." Moreover, although Imperial plainly was part of the bargaining unit, Tex-Tan refused to concede that for several months, Tex-Tan's lawyers saying that the company officials were considering it and the officials saying that they were leaving it to their lawyer. Tex-Tan specifically admitted that the Imperial question was not a bargaining point, but after finally agreeing to it, referred to it as a bargaining concession granted in order to reach agreement with the Union. When Tex-Tan finally proposed a provision incorporating booklet language relating to the retiming of piecework jobs but preceded it with nullifying language that at the same time was enigmatic and the Union asked what it meant, the only clarification Tex-Tan would give was: "It means what it says." Throughout the negotiations, whenever the issue of piecework was discussed, Tex-Tan asserted over and over again, many dozens of times, that the Union's proposals were advanced for the purpose of wrecking the standard hour system, reiterating the assertion in the face of the Union's assurance that it fully accepted the piecework system and was prepared to work with Tex-Tan to make it operate more advantageously to both Tex-Tan and the employees. Tex-Tan had had 2 years of experience with the Union and had acknowledged that the Union had "certainly cooperated with us well during the past years." During that period the Union had not been restricted in the filing of grievances on the establishment of piece rates. It must be concluded that Tex-Tan did not believe that the Union was trying to wreck the standard hour plan but that Tex-Tan was making the statement in order to avoid meaningful discussion of the issues. The unreal nature of Tex-Tan's negotiations was especially apparent in connection with the checkoff. At the ninth conference, held after the strike had been authorized, Tex-Tan insisted on trying to create a union "must" item of that proposal, even though it had been one of those least urged by the Union. At the 15th, the last, session the Union indicated unequivocally that if Tex-Tan granted three paid holidays it would give up the checkoff and all other demands and accept Tex-Tan's contract, and the Mediator stated that the only thing standing in the way of a contract was the holidays. Tex-Tan, however, argued vigorously that the Union was really insisting on the checkoff, and the Union gave up trying to negotiate.

It is not intended by the above listing of incidents to indicate that each such action or inaction, by itself, would in all circumstances show bad faith. As stated by Judge Brown, ". . . conduct done at one time judicially ascertained to manifest good faith may, under other circumstances, be a mere pretense." *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F. 2d 229, 231. However, an overall appraisal of Tex-Tan's bargaining compels the conclusion that it did not approach the negotiations "with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." *Majure Transport Company v. N.L.R.B.*, 198 F. 2d 735, 739 (C.A. 5) enfg. 95 NLRB 311. Insisting upon unilateral control of piece rates, it merely went through motions and engaged in shadow boxing. See

Stonewall Cotton Mills v. N.L.R.B., 129 F. 2d 629, 631 (C.A. 10), enfg. 36 NLRB 240; and *N.L.R.B. v. Southwestern Porcelain Steel Corporation*, 317 F. 2d 527, 531 ~~(C.A. 10), enfg. 134 NLRB~~ 1733. Its entire performance was a counterfeit of the collective bargaining process contemplated by Congress and was in violation of Section 8(a)(5).

Respondent alleged in its answer that the Union bargained in bad faith. During the negotiations Tex-Tan imputed bad faith to the Union especially in connection with four incidents: (1) its adherence to proposals it had offered to drop in exchange for the package Tex-Tan refused to grant; (2) after the Union in the contract rundowns at the first and fourth conferences had stated that the management-prerogative, scope-of-agreement, and "no-discrimination" clauses were acceptable, it later took a different position as to each; (3) Downer said that a good incentive system required that at least 80 percent of the employees make standard, but Shapiro said that the Union's position was that every employee on piecework should make more than standard; and (4) the Union demanded an agency shop, illegal in Texas. As already indicated, Tex-Tan, not the Union, acted in bad faith with respect to the rejected package proposal. The Union's proposal had been plainly conditioned upon acceptance of the entire package and Tex-Tan had not been trapped into offering the wage increase. The Union's change of position as to the three items in (2) had no effect on the bargaining; except for the "no-discrimination" clause they were hardly discussed. These issues were raised not by the Union but by Tex-Tan, as part of its technique of diverting the negotiations from the more important issues. Without discussion the Union adopted Tex-Tan's demands on the first two items in its October 18 proposed contract. Downer's statement was not an agreement or proposal in any sense. He merely expressed an opinion about something he admitted he knew nothing about. It would appear, rather, that Tex-Tan's harping upon the incident was intended to impede useful discussion of the Union's proposal. As to the agency shop, the proposal was that it be subject to determination as to its legality and in any event it was not insisted on but was merely suggested as a possible alternative to a checkoff. The Union negotiated, despite much provocation, with patience and with fairness and reasonableness towards Respondent. It was flexible, modifying proposals and withdrawing some — ultimately virtually all — in order to make agreement possible. It is found that the Union bargained in good faith.

These conclusions are not affected in any way by the course of the discussion of settlement of this proceeding. So far as the Trial Examiner can discern, Respondent's purpose in going into this area was to bolster its claim that only an impasse on checkoff prevented agreement. However, just as that was not true during the bargaining negotiations, it was not true during the settlement negotiations. When the Union's lawyer asked whether the Company would grant "a good arbitration clause" if he got the Union to drop the checkoff, Weiss said no. Moreover, the point is not material

Respondent contends that the allegation in the Complaint that it negotiated "in bad faith with no intention of entering into any . . . agreement" is contradicted by the allegation that it insisted upon entering into an extension of the old contract, and by the fact that "the Company stood ready and willing to execute" its July 28 proposed contract. This contention is based upon a misreading of the allegation, which is not directed to the absence of intent to enter into any contract at all, but to Respondent's bona fides in negotiating. The agreement Respondent claims it was willing to execute was the old contract with no changes of substance. It did not evolve out of, and was unrelated to, the negotiations. Tex-Tan demonstrated this graphically by submitting contract proposals concerning daily and week-end overtime, vacation, and time rates for piecework jobs, and then withdrawing them without discussion and without expression of objection by the Union. The gravamen of the allegation is the character of Tex-Tan's negotiations; namely, that they were not engaged in with the purpose of working out an agreement. The complaint "brought into question the general course of the Company's conduct as it reflected its attitude toward bargaining." See *N.L.R.B. v. Mayes Bros., Incorporated*, decided August 22, 1967, __ F. 2d __ (C.A. 5) enforcing, as modified 153 NLRB 18.

G. *Concluding Findings As to the Strike*

Respondent asserts in its brief that Shapiro's testimony as to the strike meetings is so self-serving as to be obviously fabricated and incredible. However, his testimony that he told the meetings that Tex-Tan had not been bargaining in good faith finds strong corroboration in the record of the bargaining conferences, where he made the same assertion a number of times directly to Tex-Tan. As to his testimony that he said that they would not be striking for a raise in pay, Tex-Tan's adamant refusal to discuss any wage increase up to the time of the strike makes that testimony seem plausible. It is corroborated also by Shapiro's frequent advice to Tex-Tan during the negotiations that an increase in classification rates would be meaningless without provisions for participation by the Union in the establishment of rates of pay for piecework, as required by the Act. The Trial Examiner is convinced, and finds, that Shapiro's testimony as to what occurred at the two meetings is basically correct. While the Trial Examiner, in finding that Respondent failed to bargain in good faith, has adverted to some incidents during and after the strike, it is plain that there was serious violation of Section 8(a) (5) before the strike. Whatever doubt may have remained in anyone's mind as to Tex-Tan's *bona fides* in the negotiations was necessarily dispelled by its conduct at the ninth bargaining conference, held after the members had authorized the negotiating committee to call a strike. There Tex-Tan adhered to its position of insisting that the Union yield to it unilateral control of rates of pay for piecework; disclosed that it had failed to draft the clause as to participation in Saturday overtime which it had unequivocally undertaken to do; engaged in more argument of a kind not intended or calculated to promote agreement; and capped the whole session with an insistent and unreasonable demand that the Union submit a package proposal yielding on additional issues while Tex-Tan refused to exchange package proposals or make any proposals for change. It would not even offer the wage increase which it was ready to grant once the Union surrendered the employees' rights under the Act. It is found that the strike was caused by Respondent's failure to bargain in good faith prior to the strike and was prolonged by its further unfair labor practices during the strike.

II. *The October 4 Letter*

In late September 1965 a newspaper in Victoria, Texas, published a story in which it ascribed to Shapiro the statement, "There is no contract at this time and the employees are free to strike at any time they feel negotiations are fruitless —"

On October 4, 1965, Respondent distributed a letter to all employees reading in relevant part as follows:

* * * *

> There are rumors of strike talk. The Union has a right to call a strike if it wants to. Each individual employee has the right to decide whether he wants to strike or to work. We are telling you now emphatically that the company will continue to operate its factories, strike or no strike. Those who want to work can work. The Company also has the right to employ permanent replacements for those who want

> to strike. The company will exercise this right in the event of a strike.

* * * *

The fact that at the time the October 4 letter was issued the Union had not threatened Tex-Tan that it would strike is not material. Apart from the possible implications in Shapiro's newspaper interview, unfruitful bargaining had been going on for 5½ months, and within 2 weeks after the letter the employees did vote to strike. It is reasonable to infer that prior to October 4 there had been talk among the employees about the possibility of a strike. The General Counsel had not proved that the strike issue was created by Respondent. It is important, also, to note that the letter did not dwell upon possible loss of employment to any inordinate extent, such as might indicate a purpose which was subtly threatening rather than advisory. Respondent confined itself to a reasonable, straightforward, factual statement of problems which would confront the employees.

While Tex-Tan was aware that it had not been bargaining in good faith, it did not know when, or even whether, a strike would actually take place. Notwithstanding Tex-Tan's resoluteness in refusing to bargain in good faith, the evidence is not sufficient to establish that no circumstances could possibly supervene which would remove the unfair labor practices as a cause of the strike.

It is found that Respondent did not violate the Act by issuing the October 4 letter. *Roy E. Hanson, Jr. Mfg.*, 137 NLRB 251, 268. Distinguish *Rice Lake Creamery Co.*, 131 NLRB 1270, enfd., 302 F. 2d 908 (C.A.D.C.), cert. denied 371 U.S. 827.

I. *Johnny Hundl's Overtime*

Johnny Hundl worked in the Belt Department, where he did embossing, molding, and pointing, and also filled in on edging. Respondent's practice was to have employees work overtime to relieve bottlenecks. Overtime was usually assigned to the operator who normally did the job causing the bottleneck, provided that he was able to achieve at least standard production. When several employees were eligible, the choice fell on the highest producer.

Johnny Hundl was one of the highest producers at his work. He was a member of the Union's negotiating committee and attended at least one of the October 1965 bargaining sessions. On Saturday, October 23, 13 of the 25 employees in the Belt Department, not including Hundl, were assigned overtime. Six of the 13 did laminating, one did stamping, three did edging, one did beveling and skiving, and two did punching. None did pointing, molding, or embossing, Hundl's work, except to the extent that one of the laminators spent approximately 30 minutes finishing an embossing job that she had started the day before, which had to be finished promptly. Counsel for the General Counsel failed to establish that any of the overtime assignments that day were to persons other than those regularly assigned to the jobs which were worked. It is found that the General Counsel has not proved that Respondent deprived Hundl of overtime to which he would have been normally assigned.

3. *The Failure to Reinstate the Strikers*

On June 3, 1966, Respondent received from the Union a telegram reading as follows:[48]

> This telegram is formal notice to you that the strike at Tex-Tan Welhausen Co., and Tex-Tan Western Leather Co., Yoakum, Texas, of the Tandy Corp., is hereby terminated. Picketing and all consumer publicity have ceased. On behalf of each of the strikers, individually, this constitutes an unconditional offer to return to work. Please advise when they should report. In addition, but not as a condition to the foregoing unconditional offer to return to work, we request a meeting with your representatives on Wednesday, June 8, 1966, for the purpose of bargaining over wages, hours and conditions of employment. We will appreciate a prompt reply to this request for a meeting.

When the telegram was sent, the employees listed on Schedules 1, 2, and 3 of the Appendix of this Decision were still out on strike.

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[48] General Counsel's Exhibit 27.

At the 12th conference, 4 days later, Shapiro said that the Union had notified the Company that every striker, numbering approximately 255 in all, was prepared to return to work as of the morning of June 3 and that the Company was liable for his full wages. Weiss replied that the Company's position was that the strike was economic and that while the Company intended to recall the strikers, that would be done only on the basis of the Company's need and of where the strikers could be worked in or placed. Only 23 strikers were put to work during the week following their unconditional offer to return, 12 on June 6 and 11 on June 8. The record contains no evidence of any instance where a replacement was discharged to make room for a returning striker and a substantial number of strikers who were called back to work were assigned to jobs different from those they had had before the strike, which were held by replacements. Tex-Tan stated that the reemployment of some strikers had been delayed because it preferred their replacements. Two strikers who had worked for Respondent continuously more than 6 months up to the beginning of the strike and who applied for pregnancy leave when recalled, namely Darlene Stary and Peggy Holster, were denied it on the ground that they were coming back as new employees and therefore did not have the 6 months' seniority required to entitle them to such leave.[49] It is found that Respondent, by Weiss' statement on June 7, 1966, intended to, and did, refuse to reinstate the employees listed on Schedules 1 and 2 of the Appendix to their prior positions of employment with all their rights and privileges previously enjoyed. It is, accordingly, found that on June 7, 1966, Respondent refused the employees listed on Schedules 1 and 2 of the Appendix reinstatement to their former positions of employment, thereby discriminating against them in violation of Section 8(a) (1) and (3) of the Act. For reasons stated below this finding of discrimination does not apply to Roy Richter.

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[49] See *Cone Brothers Contracting Company*, 158 NLRB 186.

The strikers listed on Schedule 3 of the Appendix had been reemployed on June 6, so that Weiss' blanket refusal of reinstatement on June 7 did not apply to them. Except for Bessie Immenhauser and Rosie Rothbauer there is insufficient evidence that the employees listed on Schedule 3 were refused reinstatement to their prior jobs.

Rosie Rothbauer and Bessie Immenhauser: Rothbauer worked for Respondent since 1963 in the Moccasin Department. Her principal job almost from the start was doing certain work on chaps. She was the only employee assigned to that job, which took 60 to 70 percent of her time. Rothbauer was reemployed on June 6, 1966, and assigned to another work in the Moccasin Department. Her old job was done by Carmen Meza, an employee who had been hired on the first day of the strike. Immenhauser was on leave of absence when the strike started but joined the strike and picketed. Her job when she went on leave of absence was as a stitcher in the Moccasin Department on a small sewing machine and her production averaged 150 percent. After the strike she was assigned to various other work in the same department, including odds and ends. She received a warning slip for not achieving standard but subsequently did achieve standard, on one occasion as much as 132 percent. After 6 weeks she was invited to return to a job she had had during the stirke, and since she had not been given her prestrike job, accepted the offer and quit. Respondent has not established that Immenhauser's prestrike job was not available. It is found that Respondent refused Rothbauer and Immenhauser reinstatement to their former positions of employment, thereby discriminating against them in violation of Section 8(a) (1) and (3) of the Act.

Roy Richter: Richter was employed shortly before the strike, which he joined. During the strike he participated with some other men in causing an explosion one night on property near Respondent's plant. The property was not part of Tex-Tan's premises and there were no pickets in the area. Respondent was informed by the police that Richter had been prosecuted because of the incident and had pleaded guilty. Shapiro claimed during the negotiations that the incident concerned a fire cracker. Tolbert, however, testified that the chief of police informed him and other officials of Respondent that Richter had been involved in a bombing. He also testified that the explosion had caused damage to a house across the street. He stated that he was present at a discussion of the incident between Shows and Philip Welhausen, and that Welhausen decided not to reemploy Richter because of the incident. Richter did not testify. It is found that Respondent was informed by the police that a bombing had taken place; that Respondent was informed, further, that Richter had participated and had pleaded guilty; and that Respondent decided for this reason to refuse to reinstate Richter. In view of the seriousness of the conduct which Tolbert testified the police ascribed to Richter and the failure to prove that Richter was innocent, it is found that the refusal to reinstate him was not violative of the Act.

Wades Karl: Karl retired in January 1965 but within 3 or 4 days resumed work and he worked regularly up to the commencement of the strike. By arrangement with his foreman he worked an average of 2 days a week. The Company's retirement policy, of which Karl was informed, was that after reaching 65 years an employee was required to retire unless the board of directors consented to the extension of his employment for further periods of 1 year each. A short time before the strike Shows, president of Welhausen, remarked to Karl that his work had helped the Company a great deal and he asked whether Karl wanted to work again the following year. Karl said that he would be glad to if he felt all right. Karl struck on November 8 with the other employees. He received a letter from Respondent asking him to come in but told his foreman that he would not cross a picket line. The foreman replied that they would have to fill the job with somebody else. Karl was never recalled. While Tolbert testified that Karl was informed of the requirement that the board of directors consent year by year to the extension of employment of an employee reaching the mandatory retirement age, he did not testify that that was the reason Karl was not recalled. Respondent took no step to terminate Karl's employment under its retirement policy. Moreover, no showing was made that a retired employee was required to initiate the procedure whereby the board of directors consented to the extension of his employment. The record does not show that Karl made any application to the board of directors when he was granted an extension in 1965. As an unfair-labor-practice striker, Karl was entitled to full reinstatement to his position, and Respondent's refusal on June 7 to reinstate him was, as already found, discriminatory. The fact that following, or simultaneously with, reinstatement Respondent could have required him to make the application for consent to an extension of his employment does not lessen the violation.

Lawrence Pekar: Pekar worked for Respondent for about 10 months in 1961, left to go into the Armed Services, from which he returned in January 1964, after which he worked continuously until the strike. He was one of the two highest producers among the five jackknife operators in the belt department, producing at the rate of about 165 to 170 percent. Pekar acted as shop steward for two departments during the Union's 1965 organizing campaign, signing up 23 of the 26 employees in the two departments, all 23 of whom joined the strike. He was on the Union's negotiating committee and during the strike acted as picket chairman and assistant to Shapiro. He was not reemployed until September 9, 1966. On July 18, 1966, at the 13th bargaining conference when Shapiro asked why Pekar had not been recalled, Tolbert replied that the various supervisors did not want him back because of "his attitude toward the work and toward the Company." He testified that he told the supervisors within 2 weeks after the end of the strike that he thought Pekar should come back. He also testified that he did not feel ready to force the issue with the supervisors. Pekar had received three warning slips prior to the strike, one for rolling an unattended dolly across the floor, one for talking to another employee, and one for taking time off without first getting permission. Tolbert testified that he received a report that during the strike Pekar had driven his car in such a manner as to block two women who were driving home, but he said nothing about it at the bargaining conference. Pekar denied that he had done that and the Trial Examiner has credited his denial. Tolbert testified that Pekar was "a good hand and a good worker" and that when Pekar spoke to him about the warning slips he advised Pekar not to "pick up these adolescent habits" because he had a good record and the Company wanted to keep him that way."

It is found that Respondent delayed reemploying Pekar because of his leadership in the organizing campaign and the strike and that his prestrike conduct was seized upon as a pretest to justify a discriminatory refusal to reinstate an outstanding leader of the employees in their concerted activities. It is further found that Pekar did not engage during the strike in conduct which justified Respondent's refusal of reinstatement.

K. *Assignment to More Arduous Duties and Denial of Leave of Absence*

As the strike has been found to have been caused by unfair labor practices, the allegations that Respondent assigned more arduous and less agreeable tasks at lower wages to certain strikers, discharging one and constructively discharging others, and that it denied leaves of absence to three strikers, are subsumed by Respondent's refusal to reinstate all the strikers. No additional findings or remedial order is required.

L. *The Warning Slips*

Frank Bluda, Virginia Ferrell, Rosie Hundl, Bessie Immenhauser, Bennett Krahovjak, Mary Rohan, Rose Rothbauer and Henry Wagner all participated in the strike, were reemployed by Respondent after its termination but were assigned to jobs materially different from those they held immediately prior to the strike. After such reemployment each received one or more warning slips because of low production. The warning slips all included the statement, "Unless you take steps at once to correct the above, disciplinary action will be applied immediately," and Ferrell's had a specific warning of possible discharge. Even prior to the strike any employee producing below standard after a certain period on the job was theoretically subject to receiving a warning slip and ultimately to being discharged. However, Respondent had no defined policy as to taking those steps. The record establishes that employees were retained indefinitely even though their production was regularly under standard and that warning slips were dispensed with. The Respondent claimed that such an exception was made when the foreman was convinced that the employee was making reasonable effort to improve his production. It may be inferred that the foreman's discretion was exercised also on the basis of how readily replacements could be found for the particular job, as in the case of rawhide stitching and cutting which many employees found unpleasant and undesirable. It is unnecessary to decide whether Respondent's irregular practice would have resulted in the issuance of warning slips to employees with the experience on the job of the eight employees under discussion had they not been strikers. There is no evidence that their low production was in the nature of sabotage. Respondent's assigning them to different work from what they had done prior to the strike was discriminatory and coercive, and it placed them under a handicap in their work. The coerciveness of that action of Respondent was reinforced by the warnings of disciplinary action. It is found that by issuing the warning slips to Frank Bluda, Virginia Ferrell, Rosie Hundl, Bessie Immenhauser, Bennett Krahovjak, Mary Rohan, Rose Rothbauer and Henry Wagner, Respondent further violated Section 8(a) (1) of the Act.

Margaret Wicks struck on November 8, 1965, and returned to work on June 20, 1966. She was assigned to her prestrike work, which was on belts, but on a different shift. She was required to report on her daily production sheet the number of belts she had worked on. Prior to the strike if an employee had not completed a customer's lot, it was laid aside for him to complete the next day. After the strike an incomplete lot was completed by an employee on the next shift, and each was required to report his own production. Shortly after her return Wicks received an oral warning from her foreman that she had reported doing 70 belts more than she had actually worked on; later she was told that on another day she had reported too few belts. This was followed by a warning slip on July 22, which included an express warning of possible discharge. A short time later, because of the confusion employees were experiencing in keeping count under the new system, Respondent reverted to its prestrike practice of having each employee work only on complete lots. Wicks had no further warning slips. There is no evidence as to whether Respondent issued warning slips to any other employees involved in the confusion about counting the belts or as to whether in issuing the slip to Wicks Respondent departed from its usual practice, and it has not been proved that Respondent did not believe that Wicks had made the errors. It is found that the General Counsel has failed to sustain the burden of proving that the warning slip was issued to Wicks for discriminatory reasons or in retaliation for having struck.

On the morning of July 19, 1966, three employees, Estelle Ferguson, Oleta Hobbs, and Marie Koliba were sitting on the steps of one of Tex-Tan's buildings waiting for the doors to open, when a fourth employee, Agnes Koliba, approached and then turned round and left. Ferguson and Hobbs had been on strike up to the end; Agnes Koliba had said that she would go out on strike but had not done so; and Marie Koliba, distantly related to Agnes by marriage, had been hired the second day of the strike. As Agnes was leaving, Ferguson made a remark not meant for, or heard by, Agnes. Marie informed Agnes that Ferguson had referred to her as a two-faced son-of-a-bitch and a report to that effect was made to Garrett, the superintendent. Hobbs testified that later that day Garrett asked her if she had heard of any name-calling on the steps that morning and she said no; that he asked her whether she had heard the epithet "heifer" used and she said that no names at all had been called. Garrett went to Ferguson and told her what had been reported. She replied, "Why should I do that," and Garrett said, "Well, I would not really [have] though you would." She told him she could not remember ever calling anyone a name like that. Garrett pressed her as to whether anyone else had said anything that morning which could have caused the report he had received and she told him that she could not remember anybody calling anyone names. Shortly thereafter Ferguson was summoned to the office, where, confronted by Marie, she again denied the accusation repeatedly and said that she could not remember ever calling anybody that name and that she did not talk that way. Marie said, "Oh yes you did." Three days later Ferguson received a warning slip, stating that it was given "because she causes trouble between other workers by calling them names and also upsetting other workers by making false accusations about choosing jobs." On the witness stand Hobbs and Ferguson denied, and Marie asserted, that Ferguson made the remark in question. Ferguson and Hobbs' version was that Ferguson had merely said that Agnes was right in not coming to the steps, since she said one thing and did another. It is unnecessary to decide the credibility question since the issue is not what Ferguson said but what Garrett thought she said and why he gave her the warning slip. Ferguson's own testimony about Garrett's investigation — his prodding her for recollection of something that might explain the report he had received, and his indication to her that he would not expect such a remark from her — warrants the inference that he was trying to ascertain the truth. As the only direct evidence in the record as to Garrett's motive in issuing the warning slip is the slip itself, the Trial Examiner does not reach any firm conclusion as to Garrett's belief or his reason for issuing the slip. Nevertheless, on the basis of the accounts placed before Garrett according to the uncontradicted testimony of his three informants, the Trial Examiner concludes that the General Counsel has failed to sustain the burden of proving that Garrett did not believe Marie Koliba, or that he issued the warning slip to Ferguson for discriminatory reasons.

Noe Barrera, a striker, was reemployed on June 13, 1966, and assigned to the same work he had had prior to the strike, namely, attaching buckles to belts. He received a warning slip the next day because of faulty work. He testified that what he had done had resulted from the fact that the belts supplied him were defective and that because of his need to hurry in order to keep his production up, he failed in some cases to see the defects and in those cases where he did see them nevertheless proceeded with his part of the work. After receiving the warning slips he had no further problem and his production was satisfactory. It is found that the General Counsel has failed to satisfy the burden of proving that the issuance of the warning slip to Barrera was discriminatory or coercive.

Justine Janak struck on November 8 and returned to work on Friday, June 17, when she was assigned to her old job. Her production, which had usually run about 127 percent before the strike, was 93 percent for the week ending June 18, covering less than 2 days of work after her return. For the week ending June 25 her production was in excess of 123 percent. On June 24, however, Respondent issued a warning slip to her, with the usual threat of disciplinary action, for the stated reason, "because your productivity for the week ending 6/18/66 is not up to standard (93 percent)." In its brief Respondent states that Justine Janak's foreman, Othold, issued warning slips to all employees who did not achieve standard. The record contains no evidence to that effect and it contains affirmative evidence that Tex-Tan's supervisors had discretion as to issuing warning slips. Janak had been off her job for 7 months. An employer motivated by needs of production would make reasonable allowance for an employee returning after so long an absence to get back into form. If Justine Janak had plunged right in and produced 100 percent she might well have made errors and received warning slips for that reason, as did Nöe Barrera. By the time the warning slip was issued Janak had been producing at a rate well over 100 percent. There was no testimony by Othold or anyone else explaining why in those circumstances there was any call for the warning slip. It is found that Respondent issued the warning slip to Justine Janak in retaliation for having exercised the right to strike, and as a warning that as a former striker her performance would be subject to close scrutiny and that she might be discharged upon the slightest pretext. It is further found that Respondent thereby coerced employees in the exercise of rights guaranteed in the Act.

M. *The Strikers' Vacation Pay*

At the 13th bargaining conference Weiss stated that Respondent would not pay vacation pay to the strikers. He said that the terms of the old contract with respect to vacations were being applied and that they provided, among other things, that if an employee missed 200 hours or 280 hours during the vacation year, he lost half or all of his vacation, respectively. He said that those strikers who had lost less than 200 hours and qualified otherwise would receive vacation pay. Because of absences of more than 280 hours Respondent disqualified all employees listed on Schedules 1, 2 and 3 of the Appendix for both 1965 and 1966. They were also disqualified for 1965 because they were not on the payroll on December 31 of that year. In addition Tex-Tan disqualified a substantial number of them for 1965 and all for 1966 because it computed their "continuous *service" as of less than 10 months.* In view of Weiss' statement it is found that Respondent considered the employees absent for more than 280 hours, or not on the December 31, 1965, payroll, or having less than 10 months' continuous service in either year, on the basis of absence from employment while participating in the strike.

Tex-Tan's disqualification of employees for vacation pay because of absence while on strike, would have the natural effect of discouraging strike activity and union membership unless the disqualification served Tex-Tan's legitimate business interest in some significant fashion. See *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300; see also *N.L.R.B. v. Great Dane Trailers,* *Inc*, 388 U.S. 26. When, because of strike absence, an employer reduces an employee's vacation to an extent reasonably commensurate with the employees' withholding of work, a legitimate business interest is being served which is significant in that the deferred wage — which vacation money is, see *General Electric Company*, 80 NLRB 510, 511 — is paid only for the work contribution called for by the vacation plan. In such a case there is no discrimination which discourages union membership. In *General Electric Company* strike absence resulted in merely postponing, for purposes of vacation credits, the employees' dates of hire, so that their eligibility for the various lengths of vacation provided for in the plan was delayed for a time equivalent to their striking. The employees who maintained their employment status long enough to qualify eventually received vacation pay based upon their entire work contribution without forfeiture. Whatever reduction in vacation benefits ultimately resulted was commensurate with the withholding of work. The same was true in *Mooney Aircraft, Inc.*, 148 NLRB 1057. As Tex-Tan's plan called for vacation payments based directly upon the employees' work contribution, its reduction to the extent of the employees' failure to work during the strike, which was automatic since based on earnings, would represent a legitimate business interest of Tex-Tan and would not be violative of Section 8(a) (3). However, insofar as vacation payments were denied the employees because of considerations based upon years or months of service, not related to the work contributions which measured the vacation payments under the plan, Tex-Tan's equating srike absence with normal absence served no business interest sufficiently significant to counterbalance the destructive impact which denial of the vacation pay had upon the employees' right to engage in strikes. See *N.L.R.B. v. Great Dane Trailers, Inc., supra*. Respondent urges that its arguments at the bargaining conferences establish a legitimate purpose in disqualifying the strikers. As such purpose was not testified to at the hearing, it is unnecessary to consider whether it would justify Respondent's action.

It is found that Respondent's denial of vacation pay to the strikers on the basis of their absence while striking was discriminatory and coerced the employees in the exercise of their rights under the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

It is found that the activities of Respondent set forth in section III, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

As it has been found that Respondent has engaged in certain unfair labor practices, it is recommended that the Board issue the Recommended Order set forth below requiring Respondent to cease and desist from said unfair labor practices and to take certain affirmative action which will effectuate the policies of the Act.

It has been found that Tex-Tan insisted upon unilateral control of piece rates by refusing to bargain for a definition or guiding principle to govern productivity speed ratings for incentive standards and by insisting upon an agreement that the employees not have the right to file grievances on the establishment of standards. It is recommended that Respondent cease and desist from such insistence, and, also, that it be affirmatively required to bargain about such definition or guiding principle and incorporate any agreement reached in a written contract. Under this provision of the order the existing agreement as to the achievement of 100 percent of standard without special effort must be included in a written contract unless changed without violation of the duty to bargain. The Trial Examiner finds that Tex-Tan's refusal to bargain was unrelated to the identity of the employees' bargaining agent but grew out of Respondent's basic philosophy of labor-management relations, namely, that it had to retain complete unilateral control of rates of pay for piecework. For this reason it will be recommended that Respondent be required to cease and desist from insisting upon unilateral control of piece rates not only in bargaining with the Union, but also with any other exclusive bargaining representative of the employees in the unit.

It has been found that on June 7, 1966, Respondent refused to reinstate the employees listed on Schedules 1 and 2 of the Appendix of this Decision to their former positions of employment, thereby discriminatorily discharging them, and on June 6, 1966, refused so to reinstate Rosie Rothbauer and Bessie Immenhauser. It will, accordingly, be recommended that Respondent immediately offer reinstatement to their former positions of employment to Bessie Immenhauser, Rosie Rothbauer, and all employees listed on Schedules 1 and 2 of the Appendix, other than Roy Richter. Some employees listed on Schedules 1 and 2 were thereafter offered reinstatement to their prior positions and it will not be necessary that such offers be repeated. The reemployment letters in evidence, such as those to Stary and Holster, were not, in view of Weiss' statement on June 7 and the other circumstances mentioned, offers of reinstatement. Respondent shall have the right in the compliance stage of this proceeding to establish that it offered reinstatement to their prestrike jobs to any of the discriminatees in addition to those as to whom such finding is made in this Decision. The order to make such offer of reinstatement shall not be affected by the fact that the discriminatee was discharged from or quit a job with Respondent where he was not offered full reinstatement to his prestrike job.

Edward Gomez, on returning to work after the strike, was assigned to rawhide cutting. During the 4 months immediately prior to the strike his job had been putting ground work on saddletrees. He had received three warning notices because of his low production, which had averaged 61 percent. Gomez had previously been a rawhide cutter and had produced at the rate of 180 percent, earning $2.50 an hour. However, when his job had been moved it had been retimed and his earnings had fallen to $1.68 per hour, after which the standard had been cut further. Gomez had quit the rawhide job but after 2 or 3 weeks had been reemployed and assigned to the groundwork job. After the strike, when first offered the job of rawhide cutting, he rejected it and asked for his prestrike job, which Respondent refused. Three days later he returned to the plant and offered to take the rawhide job, but Respondent rejected the offer. In August Respondent, invited him back to the rawhide-cutting job, which he accepted, and he was still so employed at the time of the hearing. His earnings averaged about $85 per week, including overtime, as compared with $50 per week on the job he had had just prior to the strike. While Gomez was more adept, and could earn more, at rawhide cutting than at his prestrike job, he was an unfair-labor-practice striker and Respondent was not authorized to decide which job was best for him. It may be that when his prestrike job is offered, he will opt to remain on the rawhide-cutting job, but Respondent must make the offer of reinstatement.

Mathew Migl, Bennett Krahovjak and Anna Mae Huetsch were reemployed after the strike at jobs other than their prestrike jobs but testified that they preferred the new jobs. Ordinarily it would not be appropriate to require that offers of reinstatement be made to employees in such situations. However at least Migl and Huetsch's new jobs had been held before the strike by strikers who must be offered reinstatement under the terms of the Recommended Order. Migl, Krahovjak and Huetsch therefore need the protection of an order requiring offers to them of reinstatement to their old jobs.

Johnny Drerschke operated a Dake machine in the saddle department for several years prior to the strike. When called back to work after the strike he was assigned to other work, and his earnings were substantially reduced. The Dake machine was being operated by a new employee who eventually quit, whereupon Respondent assigned another new employee to the Dake machine. In late September 1966 when the second new employee quit, Drerschke was finally assigned to his prestrike job. It is found that Respondent complied as of that time with its duty to reinstate Drerschke and no further offer of reinstatement need be made.

Harvey Schaefer operated the Freeman machine in the Billfold Department prior to the strike on the 7:30 a.m. to 4:30 p.m. shift. During the strike Respondent instituted two shifts, the first from 4:30 a.m. to 1 p.m. and the second from 1 p.m. to 9 p.m., and this was maintained after the strike. For some time Respondent also had a 7:30 a.m. to 4:30 p.m. shift for the later steps on its production line, but that did not include operation of the Freeman machine. When Schaefer returned after the strike, he was assigned to the same job as previously but on the 4:30 a.m. to 1 p.m. shift. He found the work more difficult because materials were not as readily available as they had been before the strike. Since the standard remained the same, he found that in order to maintain his earnings the time so lost had to be made up for by working much harder, with resulting nervous strain. Because this problem and the new hours were upsetting to his physical condition—he was a long-time ulcer sufferer—he quit. As Schaefer's prestrike job was no longer in existence[44] Respondent was obliged to offer him substantially equivalent employment. Schaefer's old shift was not available, and as the General Counsel has not proved that the 1 to 9 o'clock shift would have been more nearly equivalent to his old shift than the 4:30 a.m. shift, it is found that when Respondent reemployed Schaefer, it complied as of that time with its duty to reinstate Schaefer. No further offer of reinstatement need be made to Schaefer. Distinguish *Griffin Pipe, Division of Griffin Wheel Company*, 136 NLRB 1669, 1677, where work on the discriminatees' old shift was available.

It will also be recommended that Respondent pay the strikers their vacation pay and that it make whole Bessie Immenhauser, Rosie Rothbauer and the employees listed on Schedules 1 and 2 of the Appendix, other than Roy Richter, for any loss of earnings suffered by reason of the discrimination against them. The amount paid as backpay to each employee shall be a sum of money equal to what he would have earned from June 7, 1966, the date of Respondent's refusal of reinstatement,[45] to the date of the offer to him of reinstatement to his prestrike position. In the case of Bessie Immenhauser and Rosie Rothbauer the backpay period shall commence on June 6, 1966. The backpay shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum, to be computed in the manner described in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It is recommended also that Respondent preserve, and upon request make available to the Board, payroll and other records to facilitate the computation of backpay and vacation pay.

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[44] See *Chase National Bank*, 63 NLRB 827, 828-9; see also *N.L.R.B. v. American Aggregate Co.*, 305 F. 2d 559, 563 (C.A. 5).

[45] *Erie Resistor Corp.*, 139 NLRB 621, 633.

The Trial Examiner further recommends that all warning slips issued because of low production to Frank Bluda, Virginia Ferrell, Rosie Hundl, Bessie Immenhauser, Justine Janak, Bennett Krahovjak, Mary Rohan, Rosie Rothbauer, and Henry Wagner be removed from their personnel files.

As some employees entitled to offers of reinstatement, backpay, or vacation pay under the terms of the Recommended Order are not presently employed by Respondent, it will be recommended that Respondent send copies of the Appendix to all persons listed on the attached schedules not employed by Respondent.

Upon the basis of the foregoing findings of fact and of the entire record in this case, the Trial Examiner makes the following:

Conclusions of Law

1. Respondent, Tex-Tan Welhausen Company, Tex-Tan Western Leather Company, Division of Tandy

Corporation, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is, and at all times material has been, an employer within the meaning of Section 2(2) of the Act.

3. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. All production and maintenance employees at Tex-Tan's Yoakum, Texas, plant, regular and extra truckdrivers, shipping and receiving employees, and leadmen, but excluding office-clerical employees, confidential employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material the Union has been, and is still is,. the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, within the meaning of Section 9(a) of the Act.

6. By refusing to bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By refusing to reinstate unfair-labor-practice strikers to their former positions of employment and by denying them vacation pay Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

8. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, Respondent, Tex-Tan Welhausen Company and Tex-Tan Western Leather Company, Division of Tandy Corporation, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Insisting, as a condition to entering into an agreement with Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, or any other exclusive bargaining representative of its employees in the appropriate unit, upon a provision depriving the employees of their right to file grievances on the establishment of standards for piecework.

(b) Insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees in the appropriate unit, upon excluding from such agreement any definition or guiding principle as to productivity speed ratings on the basis of which production standards for piecework are to be established.

(c) Refusing to incorporate into a written contract with the Union its agreement as to productivity speed ratings upon the basis of which production standards for piecework are to be established.

(d) In any other manner insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees, upon being given the right to fix the rates of pay of its piecework employees unilaterally.

(e) Refusing to furnish the Union its written job descriptions in advance of timestudies by the Union in connection with any grievances or in connection with the preparation for the negotiation of contract with Respondent.

(f) Changing factory rules without affording the Union opportunity to bargain as to such changes.

(g) In any other manner refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or any other terms or conditions of employment. The appropriate bargaining unit is:

> All production and maintenance employees at Tex-Tan's Yoakum, Texas plant, including regular and extra truckdrivers, shipping and receiving employees, and leadmen, but excluding office-clerical employees, confidential employees, watchmen, guards and supervisors, as defined in the Act.

(h) Discouraging membership in the Union by discharging or refusing to reinstate employees or denying them vacation pay, or discriminating in any other manner against them with respect to their hire or tenure of employment or any terms or conditions of employment.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the collective-bargaining representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, including a definition or guiding principle to govern productivity speed ratings for piecework standards, and embody any understanding reached in a signed contract.

(b) Upon request furnish to the Union information in its possession necessary for the Union to make timestudies or to check respondent's timestudies.

(c) Offer Bessie Immenhauser, Rosie Rothbauer, and all persons listed on Schedules 1 and 2 of the Appendix of this Decision other than Roy Richter immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights, and privileges.

(d) Notify Bessie Immenhauser, Rosie Rothbauer, and the employees listed on Schedules 1 and 2 of the Appendix, other than Roy Richter, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(e) Make Bessie Immenhauser, Rosie Rothbauer, and the employees listed on Schedules 1 and 2 of the Appendix whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner described above in section V of this Decision, entitled The Remedy.

(f) Forthwith pay to each employee on Schedules 1, 2, and 3 of the Appendix the 1965 and 1966 vacation pay due him pursuant to Respondent's vacation plan described in Article VI of the Respondent's contract with the Union dated May 10, 1963, disregarding for this purpose his absence from work between November 8, 1965, and June 3, 1966, both inclusive, with interest thereon at the rate of 6 percent per annum.

(g) Preserve and, upon request, make available to the Board's agents for examination, copying and reproduction, all social-security payment records, production records and payroll records and all other data necessary or helpful to analyze and compute the backpay and vacation pay required by this Order and to determine the identity of the employees entitled thereto.

(h) Expunge from the respective personnel records of Frank Bluda, Virginia Ferell, Rosie Hundl, Bessie Immenhauser, Justine Janak, Bennett Krahovjak, Mary Rohan, Rosie Rothbauer, and Henry Wagner any warning slips or other notations based upon low production.

(i) Post at all buildings of its plant in Yoakum, Texas, copies of the attached notice marked "Appendix."[44] Copies of said notice, on forms provided by the Regional Director for Region 23, shall, after being duly signed by its representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material. A copy of the aforesaid Appendix shall also be mailed by Respondent to each employee listed on Schedules 1, 2, and 3 thereof who at the time of said posting is not employed by Respondent, at his last known address.

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[44] If this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a decree of the United States Court of Appeals, enforcing an order" shall be substituted for the words "A Decision and Order."

(j) Notify the Regional Director for Region 23 in writing, within 20 days from receipt of this Recommended Order, what steps Respondent has taken to comply herewith.[47]

It is also recommended that the Complaint be dismissed insofar as it alleges that Respondent interfered with, restrained, or coerced employees, or discriminated against them, by distributing the October 4, 1965, letter, by interrogating or threatening employees through Rosalie Findeisen and Lou Wagner, by issuing warning slips to Noe Barrera, Estelle Ferguson, and Margaret Wicks, by depriving Johnny Hundl of overtime, and by failing to reinstate Roy Richter.

Dated at Washington, D. C.

(Signed) GEORGE TURITZ
George Turitz
Trial Examiner

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[47] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director of Region 23, in writing, within 10 days from the date of this order, what steps Respondent has taken to comply herewith."

APPENDIX C

ARTICLE III

Wages

Section 1. Wages in the Company's production departments shall be those achieved under the Company's established standard hour piece-work system, with the hours of accomplished work multiplied by the base rate for each job classification as shown by the Company's records and as developed and established by the Company from time to time.

Section 2. During the period beginning with the first pay period which begins after the date of this contract and until February 1, 1967, the wage rates shall be those submitted to the Union by the Company on September 29, 1966.

Section 3. Beginning on February 1, 1967, and covering the period from February 1, 1967 to February 1, 1968, the wage rates shall be those submitted to the Union by the Company on September 23, 1966.

Section 4. Beginning on February 1, 1968, the Company will comply with the minimum rate of $1.60 per hour which goes into effect on that date; and in lieu of additional fringe benefits (i.e., fringe benefits other than those provided for in this contract), the Company agrees that from and after February 1, 1968, it will maintain the differential provided for and established in Section 3 of this Article. In other words, effective February 1, 1968, the Company will add 20 cents to each of the rates provided for in the immediately preceding section of this Article (Section 3).

Section 5. It is recognized that the Company's standard hour piece-work system is essential to the efficient operation of the Company. The Union will do nothing to interfere with or in any way obstruct or hamper the operation of this system; provided, however the presentation of legitimate grievance under the grievance and arbitration procedure of this contract shall not be a violation of this contract. So long as it is not for the purpose of interfering with, hampering or obstructing the operation of the Company's standard hour system, but for the purpose of determining whether the provisions of this agreement are not being abused, an accredited representative of the Union, after having made previous appointment and at reasonable times, may have access to the industrial engineer's records or matters concerning the standard hour system. No such records shall be removed from the industrial engineer's office.

Section 6. Piece-work standards shall be set by the Company by engineering stop watch studies made in accordance with the Company's existing standard hour system. All such standards, as soon as released and put into effect by the Company, will be posted in each factory so that each employee affected will have full access thereto and full knowledge thereof. The Company will continue to furnish the Union with any new and revised piece-work standards.

Section 7. Employees regularly on time work shall be paid wages within the ranges now provided according to the Company's records. The Company, in assigning the time rates within such ranges beyond the automatic stations, may reward skill, versatility, productivity and efficiency.

Section 8. A piece-work employee assigned to a job which is paid on a time work basis, shall receive the classification rate for the job on which he is actually working. A piece-work employee assigned to a job normally worked on piece-work, but for which a standard has not been established, shall be paid the time work base rate for the job.

Section 9. In the event it becomes necessary to retime a job, the employee who is working on the job to be retimed shall be advised in advance of the actual taking of the time study.

Section 10. Without in any way limiting the Company's authority set forth herein and purely by way of explanation, the Company states that it is its intention that changes in the method, procedure, layout, and material for the job calls for cancellation of the existing standard and the setting of a new standard to cover the new job. Any variation from the method and procedure used when the time study was made is a "method change." All time standards are set for the particular method used at the time the time study was made, and where finally and correctly set, will not be changed unless the method, procedure, layout, material or some other circumstance or condition is changed.

Section 11. All new employees shall serve a probationary period of ninety (90) days and during such probationary period shall be paid the Federal minimum wage; however, an employee may earn in excess of the minimum wage during his or her probationary period in accordance with the Company's established standard hour piece-work system, with the hours of accomplished work multiplied by the base rate for each job classification as shown by the Company's records and as developed by the Company from time to time. During the thirteen-week apprenticeship period, apprentices shall be paid in accordance with the wage rate schedules hereinabove referred to.

Section 12. Existing piece-work standards are recognized as established. The Company has the right to establish and put into effect new or modified piece-work standards. As to new or materially modified piece-work standards, an employee who sincerely believes that there is some error or inaccuracy in the standard, and he has actually worked on the standard in question for not less than eighty (80) hours, may call his contention to the attention of his foreman. The Company will then re-check the operation and the standard. A report on such re-checking will be made to the employee who raised the question. If the employee wishes, he may request the re-checking through the union, in which event, the report on the re-checking shall be made to the Union steward in the department involved. (VI 2810-2813)

APPENDIX D

Quotation from Majority Opinion in American Ship Building Co. v. NLRB, 380 U.S. 300

"It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict, and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of Section 8(a)(3) absent some unlawful intention. The employer's permanent replacement of strikers (Labor Board v. Mackay Radio & Telegraph Co., supra), *his unilateral imposition of terms (Labor Board v. Tex Tan, Inc.*, 318 F. 2d 472, 479-482, 53 LRRM 2298), or his simple refusal to make a concession which would terminate a strike — all impose economic disadvantage during a bargaining conflict, but none is necessarily a violation of Section 8(a)(3)." (Emphasis added)

APPENDIX E

Quotation from 43 Texas Law Review 218

"In Robert Bolt's wonderful play, *A Man for All Seasons*, the hero of which is the great English lawyer, Sir Thomas More, who courageously refused to compromise his conscience and convictions despite the demands of the amorous and arrogant young Henry VIII, More is being tried for alleged high treason before a handpicked court and jury. The prosecutor, angered by More's invocation of legal principles, cries out that More is making the law 'smoky' when it 'should be clear light to discover to the court his own wrongdoing.' More replies: 'The law is not a "light" for you or any man to see by; the law is not an instrument of any kind. *The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.*' (Emphasis added) In the field of labor law, the citizen and his lawyer find it increasingly difficult to find the 'causeway' upon which they may safely walk. The citizen and his lawyer have the uneasy feeling that the bureaucratic termites are rapidly demolishing whatever causeway once existed."

Appendix F

Demonstration that "Examples" of Tex Tan's Bad Faith Mentioned in Opinion have no Support in the Record

(a) Threat to move plant to Puerto Rico: The stenographic transcript of the meeting referred to establishes that the Company expressly disclaimed any such threat. (I 388).

(b) Refusal to discuss wage increase until other disputed matters settled: the Company at no time refused to discuss wages; it simply expressed a desire to resolve other issues before it made its wage proposal. In *Collins and Aikman Corp. v. NLRB*, 1968, 395 F. 2d. 277 (CA 4), the court denied enforcement of an 8(a)(5) order holding: "Congress did not invest the Board with such broad power to control the schedule of matters to be considered in the process of collective bargaining."

(c) Contractual language concerning grievances on establishment of standards: as shown above, the argument here involves the substance of the contract, the Board dictating language different from that proposed by the Company.

(d) Issuance of new rule book: after the strike, the Company having run short of its supply of shop rules, simply reprinted a booklet which had been in effect for many years, making minor changes occasioned by the abolition years before of a coupon system. The Union negotiator was unable to point to any substantial change in the rules. (IV 1602-1606)

(e) Avoidance of issues: the record disproves any such avoidance; the Trial Examiner's decision points to no such avoidance.

(f) Authority of Company negotiators: Trial Examiner did not even contend that Company's chief negotiator had no authority to bargain, such authority being established by the undisputed evidence.

(g) Frustration of Union's attempt to make proposal acceptable: the record disproves any such frustration. The Union could have had a contract at any time, but for its adamant position on certain issues. At the beginning of the hearing, the Union agreed to accept the Company proposal if the Company would grant the check-off.

(h) Use of unreasonable arguments: disproved by stenographic transcripts. Board seeks to sit in judgment not only on the substance of the contract, but also on the arguments used to persuade the Union to agree to the contract.

(i) Refusal to give Union's time-study engineer information: record conclusively establishes that Union had unlimited access to information.